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No. _____

In the Supreme Court of the United States

RICHARD J. VOORHAAR, ET AL.,
Petitioners,

v.

KENNETH C. ROSSIGNOL, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Fourth Circuit err by exercising pendent appellate jurisdiction over the constitutional issues?

2. Did the Fourth Circuit utilize an incorrect state action analysis by relying upon case law regarding whether private citizens, rather than state officials, act under color of law?

3. Did the Fourth Circuit err by essentially holding that a state official's motive, where related to his official position, is sufficient alone to render the state official's otherwise private actions "under color of law," regardless of whether the official intended to act in his official capacity or misused power possessed by virtue of his state authority?

4. What is the appropriate analysis for lower courts to follow in determining whether state officials act under color of state law under 42 U.S.C. §1983?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners

At the time of the events forming the basis of this case, Petitioner Richard J. Voorhaar was the Sheriff of St. Mary's County, Maryland and was a candidate for re-election. Petitioner Richard Fritz was a private citizen and candidate for the office of State's Attorney for St. Mary's County, Maryland. Daniel Alioto was a Deputy First Class for the St. Mary's County Sheriff's Office. Petitioner Steven Doolan was a Captain for the St. Mary's County Sheriff's Office. Petitioner Lyle Long was a Sergeant for the St. Mary's County Sheriff's Office. Petitioner Michael Merican was a Sergeant for the St. Mary's County Sheriff's Office. Petitioner Steven Myers was a Deputy First Class for the St. Mary's County Sheriff's Office. Petitioner Edward Willenborg was a Corporal for the St. Mary's County Sheriff's Office. Petitioner Harold Young was a Deputy First Class for the St. Mary's County Sheriff's Office. Board of County Commissioners for St. Mary's County, Maryland is a government entity and has no corporate affiliations. Petitioners were the Defendants in the District Court, and the Appellees before the Fourth Circuit Court of Appeals.

Respondents

Respondent Kenneth C. Rossignol is a private citizen and, at the time of the events herein, he was the sole proprietor of Respondent Island Publishing Company, trading as *St. Mary's Today*. Island Publishing Company forfeited its Charter in 1992. Petitioner is unaware of any publicly held company owning ten (10%) percent or more of said company's stock. Respondents were the Plaintiffs in the District Court, and the Appellants before the Fourth Circuit Court of Appeals.

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The March 12, 2003, Order of the United States Court of Appeals for the Fourth Circuit denying Rehearing and Rehearing *En Banc* is reprinted at App. 1a. The January 16, 2003 Panel decision of the United States Court of Appeals for the Fourth Circuit is reported at 316 F.3d 516 (4th Cir. 2003) and is reprinted at App. 3a. The February 21, 2002 unreported opinion of the United States District Court for the District of Maryland is reprinted at App. 24a.

STATEMENT OF JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was issued on January 16, 2003. The Fourth Circuit issued its order denying rehearing and rehearing *en banc* on March 12, 2003. This petition for writ of certiorari is timely in that Petitioner has filed it within 90 days of March 12, 2003. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the under color of law requirement of 42 U.S.C. § 1983. United States Code, Title 42, Chapter 21, Section 1983, states the following:

> Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any

action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, an Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

I. Overview of the Case

This case arises out of the purchase of a number of *St. Mary's Today* newspapers on election eve in November 1998. Along with other private individuals who were not sued by Respondents, deputies Willenborg, Merican, Doolan, Long, Myers, and Young participated in the paper purchase. Following discovery, the parties filed cross-motions for summary judgment in the District Court. Respondents filed their motion for summary judgment first, asserting that there were no material facts in dispute. Petitioners filed their motion for summary judgment arguing, *inter alia*, that they did not act under color of law in participating in the paper purchase. In their opposition/reply brief in the District Court, Respondents submitted a statement of material facts that they claimed were in dispute and prevented entry of summary judgment in Petitioners' favor. Respondents submitted the additional facts *only* to defeat Petitioners' motion for summary judgment and not in support of their cross-motions. The District Court granted summary judgment in favor of Petitioners. On appeal, a Panel of the United States Court of Appeals for the Fourth Circuit held that the District Court committed reversible error by granting summary judgment in favor of Petitioners. Petitioners filed a petition for rehearing and rehearing *en banc*, which was denied by an 8-4 majority of the Fourth Circuit.

The Fourth Circuit Panel inappropriately exercised pendent appellate jurisdiction over the constitutional issues although decision of the constitutional issues was not inextricably intertwined with, nor necessary to meaningful review of, the under color of law inquiry. Thus, the Panel decision is in direct conflict with the Court's holding in *Swint v. Chambers County Commission*, 514 U.S. 35, 50-51 (1995). The Panel decision also conflicts with the Court's decisions, prior Fourth Circuit decisions, and other Circuit Courts of Appeals' decisions regarding whether a state official acts under color of law because the decision relies upon a "nexus" between the deputies' motives and their state employment to conclude that they acted under color of law, despite the lack of evidence to demonstrate that the deputies intended to act in their official capacities or that they misused power possessed by virtue of their positions as state officials.

II. Background of the Case

Kenneth Rossignol and Island Publishing Company (hereinafter "Rossignol" or "Petitioners") brought this lawsuit against Sheriff Voorhaar, the Board of County Commissioners for St. Mary's County, Richard Fritz and sheriff's deputies Alioto, Doolan, Willenborg, Merican, Long, Myers, and Young alleging violations of their First, Fourth and Fourteenth Amendment rights pursuant to 42 U.S.C. § 1983, as well as various state law claims.

In November 1998, Rossignol was the publisher of a local weekly newspaper, the *St. Mary's Today*. Fritz was a candidate for the office of State's Attorney for St. Mary's County. Doolan, Merican, Willenborg and Long worked on Fritz's election campaign. At that time, Sheriff Voorhaar was a candidate for reelection, and Doolan, Merican and Myers worked on his campaign.

The *St. Mary's Today* paper was known for publishing unsavory stories and had referred to Doolan as a "drunk," Willenborg as a "child abuser," and Merican as a "shoeshine boy." Willenborg came up with the idea to protest the *St. Mary's Today* and to support candidates Voorhaar and Fritz by purchasing *St. Mary's Today* papers. Willenborg ran into Dick Copsey and Duke May, two private citizens, at a Fritz campaign meeting at Fritz's house and he mentioned his idea to both of them. Copsey and May stated that they already had the same idea and they agreed to participate. Copsey was a real estate agent and May was an insurance agent. Willenborg also mentioned his idea to deputies Doolan, Long, and Merican and they agreed to participate. Word of the plan began to spread among Fritz's supporters, who offered money to purchase papers.

Willenborg, Merican, Doolan, Alioto, Duke May and his wife, and Dick Copsey and his wife met at the Copseys' house on November 1, 1998, the night before the paper purchase. At the meeting, Willenborg suggested that they should get receipts for the papers they were going to buy and that they should videotape themselves placing money into news boxes so that Rossignol could not accuse them of stealing newspapers. The deputies agreed that they would not wear any type of police attire during the time they were purchasing papers. Willenborg had money that people had donated toward purchasing papers and he gave $1,000.00 to Copsey to pay for the papers that Copsey and May were going to purchase. They agreed that Copsey and May would purchase papers in the north end of the county and that Willenborg, Merican and Doolan (and Long, who was not present) would purchase papers in the south end of the county. They did not plan to nor did they cover the entire county, just a portion of it. Moreover, they agreed that if any store clerks refused to sell papers to them, that they simply would not buy them.

Others who heard about the planned purchase of the *St. Mary's Today* and participated included Dave Densford and Megan Cryer (private citizens). Densford made stickers depicting a trash can with a *St. Mary's Today* newspaper being thrown into it. Cryer purchased all of the *St. Mary's Today* papers at Mattingly's Finer Foods and also purchased all of the *St. Mary's Today* papers from two news boxes. Cryer was a Fritz supporter who bought papers on election day because she heard that Rossignol was going to try to sway the election by printing something negative about Fritz. Citizens who donated money toward purchasing the election day edition of the *St. Mary's Today* included Candace Guyther, Billy Cryer, Rob Kwatoski, Betty Taylor, and David Willenborg (none of whom were public officials or employees). Sheriff Voorhaar was aware of the plan and contributed $500.00 of his personal money toward the paper purchase. Fritz was aware of the plan and Fritz's brother contributed $500.00 to pay for papers. During the time they were purchasing papers, the deputies were off duty, out of uniform, and used their personal vehicles. Young came along that night and participated in the paper purchase briefly, but he was not involved in its planning. Alioto was on duty that night, but he did not participate in the paper purchase. Neither Fritz nor Voorhaar participated in the paper purchase.[1]

On the night of November 2, 1998, the three groups (two groups of deputies and Copsey and May's group) proceeded to drive around purchasing *St. Mary's Today* papers at various news boxes and convenience stores. The deputies videotaped themselves as they purchased papers from news boxes and collected receipts for papers they purchased in stores. One of

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[1] Sheriff Voorhaar bought some newspapers on the morning of November 3, 1998. However, there is a dispute as to whether he bought four (4) or fifteen (15) copies of the paper. In any event, there is no dispute that Voorhaar did not participate in the organized paper purchase.

the convenience stores where Long, Myers and Willenborg's group purchased papers was the Great Mills 7-11. The clerk working the 11:00 p.m. to 7:00 a.m. shift on November 2-3, 1998, was Justin Van Patten. A surveillance tape from the Great Mills 7-11 from November 3, 1998, depicts Long, Myers and Willenborg purchasing papers twice during the early morning hours of November 3rd. It is clear from the surveillance tape that no police authority was exerted nor did any intimidation occur. The deputies entered the store, purchased papers, and then left.

The deputies' motives for participating in the paper purchase were varied. Willenborg carried out the paper purchase in protest of Rossignol's unprofessional journalism, his half truths, and because he was tired of Rossignol's publishing lies about his family. Willenborg took vacation leave during the entire week prior to the election in anticipation of the fact that he would be working on Fritz's and Voorhaar's campaigns and to exercise his right to support candidates for political positions. Willenborg testified that the protest was not because Rossignol was critical of the Sheriff's Office, but because his reporting was inaccurate. Doolan wanted to anger Rossignol and Walter Dorsey (Fritz's opponent for State's Attorney), and he thought Fritz was a much better prosecutor than Dorsey. Doolan was on annual leave during election day events. Merican wanted to beat Rossignol at his own game in protest of his unsavory journalism. Long wanted to protest the irresponsible journalism of *St. Mary's Today* tabloid. Myers wanted to protest the careless journalism of the *St. Mary's Today*. Young, however, did not have a motive in participating in the paper purchase, as he was asked to come along that night by Merican and he did not know about the plan. Doolan testified that he did not buy any papers at all at the 7-11 in Leonardtown on election day, even though there were some available, because he had purchased enough to make his point

and to anger Rossignol and Dorsey.

III. Proceedings Below

The District Court granted summary judgment in favor of Petitioners and denied summary judgment in favor of Respondents on the basis that the purchasing deputies did not act under color of state law.

In support of their motion for summary judgment, Respondents argued that the deputies who purchased papers acted under color of state law because their conduct was directly related to their performance of official duties because it was allegedly carried out in retaliation for the *St. Mary's Today's* criticism of their official performance. The purported "nexus" between the deputies' motives and their private actions, Respondents argued, rendered the deputies' actions under color of state law for purposes of § 1983. The District Court held, first, that Respondents' "nexus" argument was inapplicable to the deputies whose sole motivation was not retaliation but, rather, to support Fritz as a candidate. App. 36a. Second, the District Court held that Respondents' proposed state action analysis, relying upon the alleged "nexus" between Petitioners' alleged motives and their official positions, was erroneous because it misapplied the law regarding whether a state official acts under color of state law in violation of § 1983. App. 36a-37a.

The District Court rejected Respondents' reliance upon case law applicable to whether private citizens, rather than state officials, act under color of law and held that the converse situation existed in this case, *i.e.*, the inquiry was whether the deputies as state employees or officials acted under color of law. *Id.* Therefore, the proper state action analysis was whether the actions complained of were committed while the deputies were purporting to act under the authority vested in them by the state or were otherwise made possible because of

the privileges of their employment. The District Court, viewing the factual evidence in a light most favorable to Respondents, concluded that Petitioners did not utilize their state authority or privileges of their employment to intimidate or coerce any store clerk into selling them papers and, thus, the deputies did not act under color of state law. App. 38a-40a.[2]

With respect to Fritz, the District Court granted summary judgment in his favor because the paper purchase constituted private conduct not executed under color of state law and, therefore, Fritz could not be held liable as a joint actor with the state. App. 40a-41a. The District Court also granted summary judgment in favor of Sheriff Voorhaar and the County, holding that Voorhaar could not be held liable because his minimal involvement was personal, the money he contributed was toward the personal pursuits of the deputies, that Voorhaar had not acted as a municipal policymaker for the County, and that there was no evidence that he directed or ordered the deputies to carry out the paper purchase. App. 41a. The District Court granted summary judgment in favor of Alioto because there was no evidence to demonstrate that he participated in the paper purchase and the deputies did not act under color of state law. App. 42a. The District Court dismissed the state law claims without prejudice for lack of subject matter jurisdiction. *Id.*

Respondents appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit. A Panel of the Fourth Circuit Court of Appeals reversed the District Court's grant of summary judgment in Petitioners' favor, adopting Respondents' analysis that the purchasing sheriff's deputies acted under color of state law on the basis that they sought to censor Respondents' criticism of them in their official

[2] Because the District Court determined that Petitioners did not act under color of law, the Court had no reason to address the constitutionality of Petitioners' actions or Petitioners' claim of qualified immunity.

roles by purchasing the papers.

The Panel began its analysis not by inquiring whether the deputies acted under color of state law but, rather, by inquiring whether Petitioners' actions violated Respondents' constitutional rights.[3] App. 9a-12a. The Panel concluded that the deputies violated the First Amendment by targeting Rossignol's newspaper for suppression and retaliation because they disagreed with its viewpoint and to prevent the paper's message from being disseminated. *Id.*

After determining that the deputies violated the First Amendment because of their unconstitutional motives, the Fourth Circuit Panel next addressed the "under color of law" requirement of 42 U.S.C. § 1983. The Panel stated that "Section 1983 therefore includes within its scope apparently private actions which have a 'sufficiently close nexus' with the State to be 'fairly treated as that of the State itself.'" App. 13a (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). The Panel held that the "requisite nexus between defendants' public office and their actions during the seizure [*i.e.*, the paper purchase]" arose out of their "censorial motivation." App. 14a. The Panel concluded its state action analysis by holding that where the "sole intention" of a public official is to suppress speech critical of his conduct, his actions are more fairly attributable to the state. App. 15a. This link, the Panel opined, "between the seizure's purpose and defendants' official roles helps demonstrate that defendants' actions bore a 'sufficiently close nexus' with the State to be 'fairly treated as that of the State itself.'" App. 17a.

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[3] The Panel exercised pendent appellate jurisdiction over the constitutional claim on the basis that the First Amendment inquiry was "inextricably intertwined with defendants' motion for summary judgment, since the same retaliatory suppression of core political speech lies at the heart of each." App. 22a, n.3.

The Panel also noted several "additional factors reinforc[ing]" its decision that Petitioners acted under color of law. App. 17a. First, the Panel assumed that the deputies positions as deputy sheriffs gave them the ability to "ensure that they would not be prosecuted for their election day seizure." *Id.* The Panel also noted that its decision was "reinforced" by evidence that the deputies' "identities as state officers played a role at several points during the seizure itself." App. 18a. The Panel concluded that, "[i]n sum, the nexus between defendants' actions and the state arose from more than just defendants' desire to still criticism of their public performance. Their status as sheriff's deputies enabled them to execute their scheme in a manner that private citizens never could have." App. 20a.

The Panel also held that Sheriff Voorhaar acted under color of state law on the basis that he provided "significant encouragement" to the deputies and that his position as Sheriff "gave him the ability to help shield his coworkers from the consequences of their crime," though there was no evidence that he did so. App. 18a. The Panel decision contains no analysis with regard to Fritz. The Panel declined to address the issues of qualified immunity, municipal liability, the Maryland constitutional and common law claims, or Deputy Alioto's liability.

Petitioners timely petitioned for rehearing and rehearing *en banc*, which was denied on March 12, 2003.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 identifies the considerations governing review on a petition for writ of certiorari. The character of the reasons governing whether the Court will exercise its discretion to grant a petition for writ of certiorari include whether "a United States court of appeals has decided . . . an important federal question in a way that conflicts with

relevant decisions of this Court." Another consideration is whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . ." Moreover, the Court may exercise its discretion where a United States court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." All of the foregoing considerations are present in this case and warrant the Court's review.

I. REVIEW IS WARRANTED BECAUSE THE FOURTH CIRCUIT PANEL DECISION INAPPROPRIATELY INVOKES PENDENT APPELLATE JURISDICTION OVER THE CONSTITUTIONAL ISSUES.

A. The Fourth Circuit Panel Decision Is in Direct Conflict With the Court's Decision in *Swint v. Chambers County Commission.*

The District Court decided only the issue of whether Petitioners acted under color of state law for purposes of 42 U.S.C. § 1983. Because the District Court's entry of summary judgment for Petitioners on the issue of state action was a final decision, the Fourth Circuit's jurisdiction was based upon 28 U.S.C. § 1291. The Fourth Circuit Panel exercised pendent appellate jurisdiction over the merits of the constitutional claim on the basis that the First Amendment inquiry was "inextricably intertwined with defendants' summary judgment motion, since the same retaliatory suppression of core political speech lies at the heart of each." App. 22a (citing *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 50-51 (1995)). In other words, the Panel decided that because the Petitioners' motives were "relevant" to both the First Amendment and under color

of law inquiries, it was necessary for it to decide both.[4] The Panel's exercise of pendent appellate jurisdiction over the constitutional issues directly conflicts with the Court's holding in *Swint*.

Swint involved an interlocutory appeal of the district court's denial of qualified immunity to several county officials. The county sought pendent appellate review of its motion for summary judgment at the same time the court ruled on the qualified immunity issue. This Court held that the appellate court lacked jurisdiction over the County's summary judgment motion and that it could not exercise jurisdiction over that issue in the interests of judicial economy. The Court described the mischief that could result from such exercises of appellate jurisdiction, stating that "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Id.* at 49-50. The concern was that parties could obtain appellate review of multiple issues by properly appealing one issue and "thereby secur[e] appellate decisions on many issues without having to wait until after trial." *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 757 (2d Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999). Such a rule, moreover, would eviscerate both the statutory scheme of 28 U.S.C. § 1292 and the general rule that federal appeals should be limited to the review of final orders. *Swint*, 514 U.S. at 47. Accordingly, *Swint* held that appellate review of an issue over which an appellate court has no independent jurisdiction is appropriate only where (1) the issue is "inextricably intertwined" with a question that is the proper subject of an immediate appeal, or (2) review is "necessary to ensure

[4] While the Fourth Circuit Panel decision does not specifically state that it is invoking pendent appellate jurisdiction over the Fourth Amendment issue, it appears to do so, inasmuch as the decision repeatedly refers to the paper purchase as "the seizure."

meaningful review" of an issue over which the appellate court has jurisdiction. *Id.* at 51.

Respondents in this case achieved exactly what *Swint* intended to prevent, *i.e.*, a decision on the merits of a collateral issue not decided by the District Court and not necessary to decision of the properly appealed issue. The Panel decision asserts that the constitutionality of Petitioners' actions is "inextricably intertwined" with whether they acted under color of state law. However, it is well established that the two issues are entirely separate and, at the very least, decision of the former is not "necessary" for meaningful review of the latter. *See Jackson v. Metro. Edison Co.*, 419 U.S. at 358-59 (because the Court concluded there was no state action, it "therefore ha[d] no occasion to decide whether petitioner's" constitutional rights were violated); *Mentavlos v. Anderson*, 249 F.3d 301, 323 n.8 (4th Cir.), *cert. denied*, 534 U.S. 952 (2001)("Because we conclude that Anderson and Saleeby did not act under color of state law, we need not reach the issue of whether their actions, if taken under color of state law, would have deprived Mentavlos of a right secured by federal law."). *Cf. Harmon v. Brucker*, 355 U.S. 579, 581 (1958)(*per curiam*)(courts should avoid deciding constitutional questions unless they are essential to disposition of the case); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936)(Brandeis, J., concurring) (noting that a court should avoid answering a constitutional question if an alternative basis of decision fairly presents itself). *See also Archie v. Lanier*, 95 F.3d 438, 443 (6th Cir. 1996)(holding that "[w]hether Lanier's sexual abuse of plaintiffs was a judicial act is not connected in any way to whether plaintiffs have stated a claim," and noting that *Swint* "intended to restrict discretionary appellate jurisdiction, rather than to expand it.").

While the deputies' motives are a relevant consideration within the totality of the circumstances in deciding the issue of state action, those motives were readily capable of being

considered by the Panel without decision of the constitutionality, *vel non*, of the deputies' actions.[5] Therefore, the constitutional issues were not "inextricably intertwined" with the state action issue, nor was review of the constitutional claims "necessary to ensure meaningful review." The Panel's decision of the First and Fourth Amendment claims is, thus, in direct conflict with the holding and rationale in *Swint*.[6]

B. The Fourth Circuit Panel Decision Is in Direct Conflict With the Decision of the Sixth Circuit Court of Appeals in *Archie v. Lanier*.

In *Archie v. Lanier*, the United States Court of Appeals for the Sixth Circuit interpreted *Swint* in the following manner:

> It seems clear that *Swint* intended to restrict discretionary appellate jurisdiction, rather than to expand it. The Court did not intend to enlarge the already narrow categories of interlocutory appeals when it stated that nonappealable questions may be addressed

[5] If, as the Panel held, the constitutional claims were indeed "inextricably intertwined" with the issue of whether Petitioners acted under color of state law, then one would think that the issue of Petitioners' entitlement to qualified immunity would be equally so "intertwined." Particularly, if the First Amendment issue was inextricably intertwined with the state action issue, then it would logically follow that the issue of whether Petitioners' "retaliatory suppression of core political speech" violated clearly established law would similarly be so intertwined.

[6] To the degree that the Panel decision relies upon the interests of judicial economy in deciding the constitutional issues, *Swint* implies and the Second Circuit has explicitly held that pendent appellate jurisdiction is permitted only where the issue is inextricably intertwined or review is necessary to ensure meaningful review, regardless of whether considerations of efficiency militate in favor of exercising pendent appellate review of an issue. *Rein*, 162 F.3d at 758-59. As the Second Circuit noted in *Rein*, most circuits adopt a restrictive understanding of the exceptions to *Swint*'s general rule. *Id.* at 758 (citing cases).

> if they are 'inextricably intertwined' with the issue that *is* appealable. Given the extent to which the Court engaged in a thorough explanation of the limited nature of appellate jurisdiction, the 'inextricably intertwined' requirement was not meant to be loosely applied as a matter of discretion. Rather, the terms can only be understood, in the context of the opinion, to mean that pendent jurisdiction may be exercised only when the immunity issues absolutely cannot be resolved without addressing the nonappealable collateral issues. To read *Swint* otherwise is effectively to undercut the rule it established, and which in turn rests upon the permissible bounds of a federal appellate court's powers.

95 F.3d at 443. *See also Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 797 (6th Cir.), *cert. denied*, 525 U.S. 964 (1998)(similarly utilizing a restrictive interpretation of *Swint*'s exceptions).

The Fourth Circuit Panel decision in this case interprets *Swint* in a manner that is in direct conflict with the above-quoted interpretation of *Swint* by the Sixth Circuit. The Panel decision loosely applied the "inextricably intertwined" requirement even though the state action issue could have been readily resolved without addressing the nonappealable constitutional issues. The Panel decision thus completely undercuts the Court's decision in *Swint* (at the very least) and directly conflicts with the Sixth Circuit's interpretation of *Swint*. *See also Nolen v. Jackson*, 102 F.3d 1187, 1189 (11th Cir. 1997)("the existence of pendent appellate jurisdiction is uncertain in the wake of *Swint*"); *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 416 (4th Cir. 1999)(recognizing that *Swint* brought the court's "ability to exercise pendent appellate jurisdiction . . . into question.").

II. REVIEW IS WARRANTED BECAUSE THE FOURTH CIRCUIT PANEL'S STATE ACTION ANALYSIS RESTS SOLELY UPON MOTIVE RELATED TO STATE EMPLOYMENT AND, THUS, THE PANEL DECISION IS IN DIRECT CONFLICT WITH THE COURT'S STATE ACTION JURISPRUDENCE.

To state a claim for relief in an action brought under § 1983, a plaintiff must establish deprivation of a right secured by the Constitution or laws of the United States and that the alleged deprivation was committed under color of law. 42 U.S.C. § 1983; *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). "Careful adherence to the 'state action' requirement" thus "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). "The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Id.* at 1004. "What is fairly attributable [to the State] is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Thus, "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient." *Id.* Moreover, in some cases, "there may be some countervailing reason against attributing activity to the government." *Id.* at 295 (citing *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 193 (1988)).

Since the deputies are state actors, the state action analysis utilized by the Panel is incorrect. The Panel erroneously relies upon case law pertinent to the determination of whether a private, as opposed to a state, actor has acted under color of law. Such analysis is dependent upon a finding of a

"sufficiently close nexus" between the private actor and the state. However, the instant case is not one in which a *private* citizen is alleged to have acted on behalf of or in concert with the state (except with respect to Fritz). Rather, the converse situation exists, *i.e.*, the deputies are state officials who, in purchasing *St. Mary's Today* papers, acted in their personal capacities and within their rights as private citizens and without utilizing any of their police powers. *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)("This case is obviously different from those cases in which the defendant is a private party and the question is whether the conduct has sufficiently received the imprimatur of the State so as to make it 'state action.'"). The "close nexus" test inquires whether the state has exercised coercive power over or has provided such significant encouragement to a private person that the choice in law must be deemed that of the State. *See Am. Mfrs.*, 526 U.S. at 52; *Mentavlos*, 249 F.3d at 318. Thus, the Panel clearly applied case law inapposite to the instant case. Furthermore, the question here is not whether the deputies' alleged actions merely "related" to their official duties but, rather, whether the deputies' utilized their state powers or authority in such a manner that their actions may fairly be attributed to the state.

Where the defendants are state employees or officials, as in this case, the Court has always required the abuse of state authority as a prerequisite to finding action under color of law. *See, e.g., United States v. Classic*, 313 U.S. 299, 326 (1941)(state official acts under color of law when exercising power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."); *Screws v. United States*, 325 U.S. 91, 111 (1945)(police officers who beat man to death while arresting him acted under color of law because they undertook to perform their official duties in arresting prisoner; Court noted that "[i]t is clear that under 'color' of law means under

'pretense' of law."); *Monroe v. Pape*, 365 U.S. 167, 184 (1961)(holding that §1983 proscribes the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."); *Polk County v. Dodson,* 454 U.S. 312 (1981)(public defender not a state actor because acting on behalf of client rather than state employer); *West v. Atkins*, 487 U.S. 42, 50 (1988)(holding that key determinant in state action analysis is whether state actor, at time in question, intended to act in an official capacity or to exercise official responsibilities pursuant to state law). Because the Panel's decision looks only to the alleged "nexus" between the paper purchase and criticism of the deputies related to their state employment, it directly conflicts with the Court's decisions requiring that there also be evidence present that a state employee intended to act in an official capacity or exercised official authority possessed by virtue of state law.

It is clear from a review of its decision that the Panel's state action analysis is hopelessly tainted by its outrage at what it describes as a flagrant violation of the First Amendment. The "under color of law" component, however, is not intended to encompass merely private acts, regardless of whether they are discriminatory or wrongful and regardless of the egregiousness of the conduct. *Am. Mfrs.,* 526 U.S. at 49-50 (the under color of law element of § 1983 excludes from its reach "'merely private conduct, no matter how discriminatory or wrongful.'")(quoting *Blum v. Yaretsky*, 457 U.S. at 1002).

A. The Panel Decision Focuses Solely Upon the Deputies' Alleged "Censorial" Motivation in Purchasing Papers.

Preliminarily, it is important to note that the Panel decision categorizes the deputies' motivation collectively as "retaliatory suppression" and thus ignores much of the undisputed evidence

regarding the deputies' motives in purchasing papers. The deputies purchased the *St. Mary's Today* papers as a form of protest against Rossignol and because they supported Fritz as a political candidate. The Panel failed to address the personal nature of the deputies' pursuits and evidence that the deputies were exercising their own rights as private citizens when they purchased the papers.[7] The deputies never intended to purchase all of the *St. Mary's Today* papers that were available. In fact, Doolan testified that he did not purchase more papers because he felt as if he had made his point. Many of the deputies testified that their purpose in purchasing the papers was personal, *i.e.*, to "one up" Rossignol and beat him at his own game. Some testified that they purchased papers to anger Rossignol and Fritz's opponent for the office of State's Attorney and that they were supporting their candidates for public office. The deputies were reacting to Rossignol's personal attacks and lies about them and their families and, moreover, they were exercising their rights to support the candidates of their choice.[8] Thus, the Panel's wholesale description of the deputies' intent as "censorial" is not accurate. Rather, the deputies acted in their personal pursuits when they decided to participate in the paper purchase.

Moreover, the personal nature of the deputies' participation in the paper purchase is highlighted by the relationship of the parties leading up to the event. Rossignol and Fritz previously were friends and Rossignol supported Fritz in his first

[7] The Panel focused solely upon the alleged fact that the deputies had been criticized in their official capacities in the *St. Mary's Today*. However, much of the criticism and negative comments printed in the *St. Mary's Today* about the deputies was entirely personal. For example, Rossignol referred to Doolan as a drunk and Long as a child abuser and he printed lies about Willenborg's family members.

[8] Deputy Willenborg emphasized his protest by wearing an "American flag" t-shirt while purchasing papers.

campaign for State's Attorney in 1994. At the St. Mary's County Fair in September 1998, Rossignol approached Fritz and inquired whether Fritz would place political advertisements in his paper (*St. Mary's Today*). Fritz responded that he would not advertise in Rossignol's paper. Rossignol then told another individual who was working at his booth at the fair that he would "slay" Fritz in the next edition of *St. Mary's Today*. Soon thereafter, Rossignol began printing negative items about Fritz in the paper. Prior to the 1998 election, Sheriff Voorhaar also had been friends with Rossignol. However, their relationship soured from late 1995 into early 1996 when Sheriff Voorhaar appointed a new Captain in the Sheriff's Office. Rossignol alleged that Voorhaar had promised him a "scoop" regarding that story and became angry when he did not receive the scoop. Voorhaar testified that he never made such a promise to Rossignol and that, thereafter, Rossignol began writing stories unfavorable to Voorhaar and began personally attacking many of the deputies in his paper.

B. A State Actor's Employment-Related Motive Alone Is Insufficient to Render Actions Under Color of Law.

Assuming, *arguendo*, that all of the deputies acted with a "censorial" motivation related to criticism about them in their official roles, the Panel erred by relying upon that motive as essentially dispositive of the state action issue. The only manner in which the Fourth Circuit Panel in this case could reach its desired conclusion that a censorial or retaliatory motive created state action was to "reinforce" its finding with evidence that the deputies also used or abused their state authority or positions as deputies to purchase the papers. A review of the evidence upon which the Panel relied in this regard demonstrates that the Panel's decision actually rests upon nothing more than the deputies' alleged employment-related motive.

The Panel first relies upon the deputies' alleged "*ability* to use their positions in the Sheriff's Department to ensure that they would not be prosecuted" and asserts that "Voorhaar's position as Sheriff . . . gave him the *ability* to help shield his coworkers from the consequences of their crime . . . ." App. 17a-18a (emphasis added). Yet, there is no record evidence whatsoever to demonstrate that the deputies or Sheriff Voorhaar used their positions to ensure that they would not be "prosecuted." The *ability* to perform an act is far removed from *actually* performing an act and, thus, the Panel's conclusion is improperly based upon nothing more than impermissible speculation and conjecture.

With regard to Voorhaar, the Panel decision points only to his personal contribution of $500.00 toward the paper purchase as evidence that he provided "significant encouragement" to the deputies. App. 18a. The Panel's invocation of the "significant encouragement" test relied upon in *Mentavlos*, however, is incorrect because Sheriff Voorhaar is a state official rather than a private party.[9] There was no evidence that Sheriff Voorhaar abused his state authority. He donated his own personal money toward the paper purchase, a personal pursuit of the deputies. Surely a state employee does not lose his ability to hold his own beliefs and views and to act upon those beliefs, or to spend his own money, where there is no indication that he used or abused his state powers in doing so. Further, while Voorhaar was aware of and even seemed to "approve" of the paper purchase, mere approval by him of a practice which the deputies were free to carry out without his approval does not transmute the practice into "state action." *See Jackson v. Metro. Edison Co.*, 419 U.S. at 356 (noting that approval by a

[9] *Mentavlos* inquired whether the actions of two private students, not state employees, were under color of law. The case did not address the converse situation which exists in this case, *i.e.*, whether state employees used their state authority and, thus, acted under color or pretense of law.

state utility commission of a request from a regulated utility, when the commission has not ordered it, does not transmute the practice initiated by the utility and approved by the commission into state action); *cf. Am. Mfrs.*, 526 U.S. at 52 (action taken by private persons "with mere approval or acquiescence of the state" is not sufficient to justify a holding that the action is state action).

The Panel decision also asserts that the deputies were "recognized as police officers by store employees throughout the county" and surmises that this "recognition" in fact compelled some clerks to unwillingly sell their papers as a result. App. 18a-19a. While testimony by Willenborg and Doolan indicated that three store clerks may have recognized them as deputies, no clerk testified to being coerced or intimidated into selling papers on that basis. In fact, the record is devoid of any evidence of intimidation, threats or coercion of any kind by the deputies. The only evidence by any one of the dozens of store clerks deposed in this case that even hinted to a finding of coercion is the testimony of Justin Van Patten. Van Patten testified that he felt as if the deputies had an "attitude" and could make his life "hell." However, Van Patten had a history of drug abuse and a criminal record, including a guilty plea for making a false statement to a police officer and, thus, his testimony regarding alleged "intimidation" was based upon his wholly subjective feelings rather than any act or conduct of the deputies. Van Patten's mere subjective reaction or feelings, in the absence of any evidence of misuse or abuse of state authority by the deputies, do not render the deputies' actions under color of state law. *See Pitchell v. Callan*, 13 F.3d 545, 548 (2d Cir. 1994)(Court rejected argument that state action present based upon plaintiff's subjective reaction to the officer's conduct rather than the nature of the activity; the Court stated that "the focus of inquiry in the instant case is not on the standard of care used by the officers but rather on

whether there was an abuse or misuse of power conferred upon them by state authority. If Callan was not acting with actual or pretended authority, he was not acting under color of law, and his actions were not state actions.").

The Panel's contention that state action is indicated by the fact that two deputies carried their service revolvers with them while purchasing the papers and that "some of those firearms were visible during the evening" is not accurate. The firearms, worn by Young and Doolan, were completely concealed and there is no evidence whatsoever that *anyone* saw the guns - not a store clerk, not a passerby, not a delivery person - no one.[10] Most importantly, no clerk testified to being intimidated or coerced into selling papers on this basis. The Panel also relies on the fact that Merican was wearing a fraternal order of police sweatshirt. However, no clerk testified that they sold the deputies papers because of the sweatshirt or because they knew Petitioners to be deputies.[11]

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[10] Deputy Young had a gun concealed on his hip and under his jacket which is visible in the videotape only when Young bends over to take papers out of a paper box. Young had his firearm with him only because he had just completed work at his secondary employment as a security guard. The only other deputy that carried his gun with him that evening was Doolan, and no witness testified to seeing his gun. Nor did any store clerk testify that Doolan ever brandished his weapon. Nor did any store clerk testify that he or she thought Doolan might have a gun.

[11] The Panel's reliance upon the deputies' stop at an outpost is misleading. Willenborg merely ran in for two minutes to use the bathroom. The Panel also states that "a group of defendants met with an on-duty sheriff's deputy who had contacted them on their department-issued pagers in order to conduct official business." App. 7a. Deputy Long simply discussed an ongoing theft investigation with Deputy Alioto and then they left. Neither of these facts is at all indicative of the use or misuse of state power or authority to carry out the paper purchase.

The Panel improperly takes judicial notice of the alleged "economic detriment" to convenience stores in selling their "entire run" of newspapers "to the police." App. 19a. However, there is no evidence that any clerk sold papers or felt compelled to sell papers based upon the deputies' status as deputies and, moreover, inasmuch as the stores sold all of their papers one can hardly presume economic detriment.[12]

Finally, the Panel concluded that the deputies' "status as sheriff's deputies enabled them to execute their scheme in a manner that private citizens never could have." App. 20a. However, private citizens *did* execute the paper purchase. Dick Copsey, Duke May, and their wives (private citizens) formed a separate team to purchase papers in a separate part of the County. It was the Copseys' house at which the participants met to plan the paper purchase. Megan Cryer also participated by purchasing papers. Dave Densford, a private citizen, made the "trash can" stickers, and many private citizens donated money toward purchasing the papers. The Panel ignored this evidence. There is simply nothing about the deputies' positions as deputies, other than the evidence that some of their alleged "motives" related to their employment, that enabled or facilitated the paper purchase. Thus, the Panel's decision that Petitioners acted under color of law rests entirely upon the Panel's finding that the deputies' motives or actions were related to criticism about them in their official roles. Reliance solely upon the deputies' alleged motive as determinative of the under color of law requirement of § 1983 renders the Panel decision in direct conflict with the decisions of this Court.

[12] There is no evidence to support the Panel's presumption that the 7-11 free coffee policy has any relevance. There is no evidence that the deputies received free coffee on the night in question or that recognition of them as police caused any clerk to be intimidated or coerced into selling them papers. In fact, the Great Mills 7-11 surveillance tape from that night showed all six deputies (coming in at separate times, three in each group) *purchasing* food and drinks.

The purpose of the state action requirement is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct at issue. *Blum v. Yaretsky*, 457 U.S. at 1004. Moreover, § 1983 was never intended to be a font of tort law. Rather, § 1983 clearly excludes from its reach the type of private conduct at issue in this case, regardless of how "discriminatory or wrongful" it may be. *Id.* The Panel erred by permitting its ire at the perceived "wrongfulness" of Petitioners' actions to dictate its state action inquiry and, thus, the Panel decision is in conflict with the decisions of this Court.

III. REVIEW IS WARRANTED BECAUSE THE FOURTH CIRCUIT PANEL DECISION IS IN CONFLICT WITH FOURTH CIRCUIT AND OTHER CIRCUIT DECISIONS ON THIS IMPORTANT ASPECT OF FEDERAL LAW.

The Panel decision ignores as "not controlling" the Fourth Circuit decision in *Hughes v. Halifax County*, 855 F.2d 183 (4th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989), where the Court rejected plaintiff's argument that state action was present because his attackers' motive was directly based upon their state employment, stating as follows:

> *He [plaintiff] places particular emphasis on the motive of the attackers as evidencing state action.* To support his claim, he cites to this court a number of cases wherein police officers or judges were held to have been acting under color of state authority during improper arrests or injudicious judicial acts. *The above cases are distinguishable because the actions complained of were committed while the defendants were purporting to act under the authority vested in them by the state, or were otherwise made possible because of the privileges of their employment.*

855 F.2d at 186-87 (emphasis added). Thus, the Fourth Circuit rejected plaintiff's contention that defendants' motive caused their actions to be under color of law where the defendants did not otherwise act under the authority vested in them by the state when they performed the mock hanging. Similarly, in the instant case, the deputies did not act under the authority vested in them by the state or made possible due to the privileges of their state employment when they purchased papers. As in *Hughes*, the fact that the deputies' motives were "related" to their state employment is insufficient to find state action.

The Panel decision attempts to distinguish *Hughes* only by referring to the deputies' alleged improper motives and the Panel's own premature conclusion that the paper purchase violated the First Amendment. Under the Panel's decision, a state actor whose motive is alleged to be "censorial" will always have the requisite "nexus" to create state action, regardless of whether he or she abused his state authority in committing the act.[13] While motive is relevant to whether the Constitution is violated, it cannot create state action where use of state authority or abuse of the privileges of state employment is simply absent.

The Panel cites two cases from other Circuit Courts of Appeal that do not stand for the proposition that motive related to state employment can be determinative of state action. In *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999), *cert. denied*, 530 U.S. 1277 (2000), the Fifth Circuit stated that "[i]n determining whether sufficient evidence supported the 'under color of law' element of the convictions, we are called on to determine, first, whether Davis misused or abused his official power." *Id.* at 415 (citing *West v. Atkins*, 487 U.S. at 50). The Court held that Davis did misuse or abuse his official authority in planning, carrying out and covering up the murder of the

[13] The Panel recognized as much by attempting to garner from the record any indicia of abuse of state authority by the deputies, no matter how weak.

woman who filed a complaint against him because he used his official powers "to access the police station, the police car, and police radio to plan, execute, and cover up the murder . . . . Davis' status as a police officer put him in the unique position to 'handle the thirty' and thus offer protection to [the murderer] from the consequences of the murder." *Id.* at 415-16. Thus, while the officer's motive originated from his state employment, it was his abuse of official authority, in addition to that motive, which led the Court to determine that he acted under color of law. Similarly, in *Layne v. Sampley*, 627 F.2d 12 (6th Cir. 1980), the fact that the threat to the officer was made through a police agency was deemed insufficient to find state action. Instead, for state action to be present, the court held that the police officer must have used or misused his state authority.

In *Gritchen v. Collier*, 254 F.3d 807 (9th Cir. 2001), the Ninth Circuit Court of Appeals rejected the argument that motive (or any one factor) alone can be determinative of state action. Officer Collier ticketed Gritchen for speeding. Gritchen filed a complaint claiming that Collier was discourteous, argumentative, and smelled of alcohol during the traffic stop. Collier sent two letters to Gritchen threatening to sue him for defamation. Gritchen filed suit alleging that Collier's threats to sue him violated the First Amendment. Gritchen argued that the "under color of law" requirement was met because Collier threatened to sue him based upon his statements about Collier's performance of his official duties as a police officer. The Court rejected this argument, holding that threatening or bringing suit was not one of Collier's duties as a police officer, that the police department's approval or disapproval was irrelevant, that Collier's private actions were not subject to the control of the department, that pursuing private litigation did not abuse Collier's position or authority as a police officer and, moreover, that a defamation suit is a

"personal" pursuit. In this case, purchasing *St. Mary's Today* papers was not part of the deputies' duties, the Sheriff's approval was not relevant or required, the deputies' private actions were not subject to the command or control of Sheriff Voorhaar, and the deputies did not intend to act in their official capacities, nor did they abuse their official status to accomplish the paper purchase.

Other Circuit Courts of Appeal have considered state-action cases involving law enforcement officers' motives related to state employment. In each case, to prove state action, the courts have required independent evidence that the officers used or misused state authority. *See e.g. Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir.), *cert. denied*, 516 U.S. 987 (1995)(no state action where on-duty police officer shot another officer with his service revolver in course of harassing or hazing the other officer; § 1983 is not implicated unless a state actor's conduct occurs in the course of performing an actual or apparent duty of office or unless the conduct is such that the actor could not have behaved in that way but for the authority of his office); *Parilla-Burgos v. Hernandez-Rivera*, 108 F.3d 445, 449-50 (1st Cir. 1997)(holding that the "but for" standard articulated in *Martinez* sets a "minimum threshold" and determination of whether police officer acts under color of law includes as the "key determinant" whether the actor, at the time in question, purposes to act in official capacity or to exercise official responsibilities pursuant to state law); *Monsky v. Moraghan*, 947 F. Supp. 53, 55 (D. Conn. 1996), *aff'd*, 127 F.3d 243 (2d Cir. 1997), *cert. denied*, 525 U.S. 823 (1998)("Arguing that, because an individual is a state employee, his conduct is state action is tantamount to the tail wagging the dog: Status as a state employee is not enough to establish action under the color of state law."); *Barna v. Perth Amboy*, 42 F.3d 809 (3d Cir. 1994)(no state action where off-duty police officers exercised no police authority, the

underlying nature of the dispute appeared personal, and there was no evidence that officers were on official police business); *Delacambre v. Delacambre*, 635 F.2d 407 (5th Cir. 1981)(alleged assault by on-duty police chief at police station did not occur under color of law because altercation with the plaintiff, defendant's sister-in-law, arose out of personal dispute *and* defendant neither arrested nor threatened to arrest the plaintiff); *Miss. Women's Med. Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989)(no state action where off-duty police officer joined in an abortion clinic protest and wrote threatening letter on police department letterhead to abortion clinic, because he acted in his personal capacity and did not exercise any police authority); *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476 (9th Cir. 1991)(finding that jury reasonably could have concluded that defendant used his government position to exert influence and physical control over plaintiffs in order to sexually assault them); *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997)(off-duty deputy did not act under color of law when he assaulted and attempted to rob victims in their home even though victim allegedly recognized officer because officer did not show his badge, or use his police authority in carrying out the robbery); *Haines v. Fisher*, 82 F.3d 1503, 1508 (10th Cir. 1996)(held that on-duty police officers who staged a robbery at a convenience store as a practical joke, allegedly in retaliation for an earlier call from the store clerk to report suspicious activity, did not act under color of law because officers did not use their state authority to carry out the plan, even though they used a number of items of police property); *Morgan v. Tice*, 862 F.2d 149, *reh'g denied*, 871 F.2d 122 (11th Cir.), *cert. denied*, 493 U.S. 813 (1989)(town manager and police officer not acting under color of state law when they defamed a political opponent during the course of an investigation even though they used official titles and said they

wanted to get enough information "to put his ass in jail").[14]

IV. THE PANEL DECISION CONFLICTS WITH THE COURT'S DECISIONS BY DRAWING CONCLUSIONS REGARDING FRITZ, A PRIVATE CITIZEN, WITHOUT ANY ANALYSIS OF WHETHER HE ACTED UNDER COLOR OF LAW.

The Panel makes conclusory statements regarding Richard Fritz in the fact section of its Opinion,[15] but fails to engage in any analysis whatsoever regarding whether Fritz, a private party, acted "under color of law." Even assuming, *arguendo*, that the deputies acted under color of state law, whether Fritz did so requires an entirely separate analysis, which the Panel failed to undertake. Therefore, the Panel decision conflicts with the Court's decisions requiring such separate analysis.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

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[14] At the very least, these differing results indicate that the lower courts are in need of clarification regarding the proper weight to accord motive in the under color of state law analysis involving a state employee. *See* Steve Libby, Note, *When Off-Duty Officials Act Under Color of State Law for Purposes of Section 1983*, 22 Mem. St. U. L. Rev. 725, 732-45 (1992)(arguing that some courts follow an objective approach focusing on whether the state authorized the individual's action and that others emphasize victim perception thus employing a subjective framework).

[15] Fritz was not the deputies' attorney, nor did he perform "research" regarding the proposed paper purchase, nor did he give legal advice. Fritz voiced his opinion that "we live in the United States of America, and it's a free market society" and they could buy papers that are for sale.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-1326

[Filed March 12, 2003]

KENNETH C. ROSSIGNOL; ISLAND PUBLISHING COMPANY, a/k/a St. Mary's Today,
Plaintiffs - Appellants,

versus

RICHARD J. VOORHAAR, St. Mary's County Sheriff's Office; RICHARD FRITZ, State's Attorney for St. Mary's County, Maryland; DANIEL ALIOTO, Deputy First Class, St. Mary's County Sheriff's Office; STEVEN DOOLAN, Captain, St. Mary's County Sheriff's Office; LYLE LONG, Sergeant, St. Mary's County Sheriff's Office; MICHAEL MERICAN, Sergeant, St. Mary's County Sheriff's Office; STEVEN MYERS, Deputy First Class, St. Mary's County Sheriff's Office; EDWARD WILLENBORG, Sergeant, St. Mary's County Sheriff's Office; HAROLD YOUNG, Deputy First Class, St. Mary's County Sheriff's Office; BOARD OF COUNTY COMMISSIONERS FOR ST. MARY'S COUNTY, MARYLAND,
Defendants - Appellees,

and)
)
JOHN DOES, 1-50,)
Defendants.)
)
THE REPORTERS COMMITTEE FOR FREDOM)
OF THE PRESS; AMERICAN SOCIETY O)
NEWSPAPER EDITORS; ASSOCIATION)
OF ALTERNATIVE NEWSWEEKLIES;)
MARYLAND-DELAWARE-DC PRESS)
ASSOCIATION; MARYLAND MEDIA,)
Amici Supporting Appellant.)
)

OPINION

Appellees filed a petition for rehearing wit suggestion for rehearing en banc.

The panel considered the petition for reharing and is of the opinion that it should be denied.

A member of the Court requested a poll o the suggestion for rehearing en banc, and a majority of the udges voted to deny rehearing en banc. Chief Judge Wilkis, and Judges Wilkinson, Niemeyer, Michael, Traxler, Kin, Gregory, and Shedd voted against rehearing en banc. Judges Widener, Luttig, Williams, and Motz voted in favor f rehearing en banc.

The Court hereby denies the petition for rehearing with suggestion for rehearing en banc.

Entered at the direction of Judge Wilkinso for the Court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-1326

[Filed January 16, 2003]

KENNETH C. ROSSIGNOL; ISLAND PUBLISHING COMPANY, a/k/a St. Mary's Today,
Plaintiffs-Appellants,

v.

RICHARD J. VOORHAAR, Sheriff, St. Mary's County Sheriff's Office; RICHARD FRITZ, State's Attorney for St. Mary's County, Maryland; DANIEL ALIOTO, Deputy First Class, St. Mary's County Sheriff's Office; STEVEN DOOLAN, Captain, St. Mary's County Sheriff's Office; LYLE LONG, Sergeant, St. Mary's County Sheriff's Office; MICHAEL MERICAN, Sergeant, St. Mary's County Sheriff's Office; STEVEN MYERS, Deputy First Class, St. Mary's County Sheriff's Office; EDWARD WILLENBORG, Sergeant, St. Mary's County Sheriff's Office; HAROLD YOUNG, Deputy First Class, St. Mary's County Sheriff's Office; BOARD OF COUNTY COMMISSIONERS FOR ST. MARY'S COUNTY, MARYLAND,
Defendants-Appellees,

and)
)
JOHN DOES, 1-50,)
Defendants.)
)
THE REPORTERS COMMITTEE FOR FREEDOM)
OF THE PRESS; AMERICAN SOCIETY OF)
NEWSPAPER EDITORS; ASSOCIATION OF)
ALTERNATIVE NEWSWEEKLIES;)
MARYLANDDELAWARE-DC PRESS)
ASSOCIATION; MARYLAND MEDIA,)
Amici Curiae in Support of Appellants.)
)

Appeal from the United States District Court
for the District of Maryland, at Greenbelt
William M. Nickerson, Senior District Judge
(CA-99-3302-WMN)

JUDGES:
Before WILKINSON, Chief Judge, GREGORY, Circuit Judge, and Frank J. MAGILL, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation. Chief Judge Wilkinson wrote the opinion, in which Judge Gregory and Senior Judge Magill joined.

OPINION

WILKINSON, Chief Judge:

Plaintiff Kenneth Rossignol brought suit against defendants for their organized efforts to suppress the distribution of the election day issue of plaintiff Island Publishing Company's newspaper, *St. Mary's Today*. Plaintiffs sought damages and injunctive relief under 42

U.S.C. § 1983, the Maryland Constitution, and Maryland common law. The district court granted summary judgment to defendants on plaintiffs' federal claims on the grounds that defendants had not acted under color of state law. It then dismissed plaintiffs' remaining state claims without prejudice. *Rossignol v. Voorhaar*, 199 F. Supp. 2d 279, 286-89 (2002). Because defendants sought to censor plaintiffs' criticism of them in their official roles, because their official positions were an intimidating asset in the execution of their plan, and because this sort of quasi-private conspiracy by public officials was precisely the target of § 1983, we reverse the judgment and remand for further proceedings consistent with this opinion.

I.

The facts of this case are largely undisputed. *St. Mary's Today* is a weekly newspaper owned by Kenneth Rossignol and primarily serving St. Mary's County in southern Maryland. It has reported extensively and often critically on local government and public officials, including County Sheriff Richard Voorhaar and his deputies, from "Captain [Steven] Doolan at the top of the rank . . . all the way to the bottom." In defendants' own words, *St. Mary's Today* published "constant belittlement" and "scandalous things" about the sheriff's deputies' performance, including what they "buy for the agency, equipment, [and] positions [they] ask for." Nor was this just "one article"; it was constantly, "week, after week, after week." This criticism also extended to a personal friend of Voorhaar named Richard Fritz, a candidate for St. Mary's County State's Attorney in the November 1998 elections who enjoyed broad support in the Sheriff's Office.

Several deputies in the Sheriff's Office anticipated that the election day issue of *St. Mary's Today* would be critical of them and their favored candidates, particularly Voorhaar and Fritz. Over the course of a series of meetings and conversations, both on the job at the Sheriff's Office and in the evening at private homes, some of the deputies formulated a plan to deal with this problem. They decided to form two teams on election day, each comprising three sheriff's deputies, and buy out the stock of *St. Mary's Today* at vending locations throughout the county. They viewed the seizure as a "good opportunity" for two things: "to piss [Rossignol] off" and to "protest [their] disagreement" with Rossignol's "irresponsible journalism." They planned to stage a "bonfire party" when the seizure was completed.

The election day issue of *St. Mary's Today* bore the front-page headline "Fritz Guilty of Rape." It accurately reported that in 1965, Fritz and three other men had pled guilty to carnal knowledge of a fifteen-year-old girl. Fritz, who was eighteen at the time of the rape, was sentenced to probation and a suspended sentence of eighteen months in state prison. The same article reported that Fritz's opponent had been convicted of marijuana possession in 1973. Another article in the issue also reported an EEOC complaint which charged that Voorhaar had assigned a deputy who complained of sexual harassment to work directly under the supervision of the harasser. Six thousand five hundred total copies of *St. Mary's Today* were printed: 2,600 papers delivered to stores in St. Mary's County, 1,100 placed in newspaper boxes throughout the county, 1,100 delivered by mail to subscribers, and 1,700 distributed to other counties. Each copy cost seventy-five cents.

Late on the night before the election, six sheriff's deputies set out in two cars. The officers were off duty, wearing plainclothes, and driving their personal cars. They drove throughout the county, buying newspapers from both newsboxes and local stores. To prove that they were purchasing the newspapers and not stealing them, defendants got receipts from the stores and videotaped themselves removing papers from newsboxes. Later that night, Rossignol discovered defendants' plan and drove through the county attempting to resupply the stores and newsboxes. But defendants followed him around the county, buying up the fresh inventory as soon as it was replenished.

During the course of the mass purchase, a group of defendants met with an on-duty sheriff's deputy who had contacted them on their department-issued pagers in order to conduct official business. Some defendants also stopped at a Sheriff's Office outpost to use facilities there during the course of the evening. One defendant wore his Fraternal Order of Police sweatshirt with the word "Sheriff" written on top of the county seal. Two other defendants carried their service weapons during the mass purchase; those firearms are visible on two videotapes of the incident and were noticed by at least one eyewitness.

Many local clerks were quite familiar with county law enforcement personnel because of 7-Eleven's policy of giving free coffee and soft drinks to police officers, even those out of uniform. Thus, many of the clerks who interacted with defendants during the night knew that they were sheriff's deputies. One clerk testified that he sold the full supply of the paper to defendants because they were police officers, had a "real intimidating attitude," and made it "real apparent [that]

they could make my life here a living hell." A different clerk told one of her store's other customers that the St. Mary's deputies were taking all of the papers. A manager of one 7-Eleven was told by one of her night employees that "it was a police officer [who] bought them." A clerk at another store also explained to her manager the next morning that "cops came in and bought them all." And a police report on the incident further notes that "several of the clerks" at convenience stores and a night watchman at Walmart had "recognized some of [the men involved in the seizure] as St. Mary's County Deputies."

The mass purchase was completed at approximately 7:00 a.m., defendants having visited roughly forty stores and forty newsboxes and removed at least 1,300 copies of the paper. At least 300 more copies were seized without payment from retailers who had not yet opened, but defendants contend that any copies taken without payment were not taken by them. One witness testified that after the mass purchase he could not find "any papers anywhere in the county."

Both Voorhaar and Fritz personally supported and participated in the mass purchase. Approximately one week before the election, one deputy spoke with Voorhaar and secured his approval for the plan. Voorhaar approved the plan, personally contributed $500 to defray purchasing costs, and wished his deputies "good luck" on the endeavor. He also personally purchased multiple copies of the newspaper early in the morning on election day. And during the days following the election, he made extensive comments in local media defending and celebrating the seizure. Likewise, Fritz explicitly approved the plan and was directly involved in planning its implementation and mapping out with the other

defendants exactly how they should proceed on the night before election day. Fritz's codefendants testified that he contributed $500 of his own money to the seizure; at a minimum, he served as a conduit for contributions which had been given to him. He also offered legal advice to defendants about the constitutionality of their plan, researching the issue before advising them that it was legal under both Maryland and federal law.

Plaintiffs brought suit in November 1999, alleging violations of their rights under the First, Fourth, and Fourteenth Amendments, as well as under the Maryland Constitution and at common law. After extensive discovery, the parties filed cross-motions for summary judgment. In February 2002, the district court granted summary judgment against plaintiffs on the § 1983 claims and accordingly dismissed plaintiffs' state law claims without prejudice. Plaintiffs now appeal.

II.

As a threshold matter, there can be no question that, if defendants acted under color of state law, they violated these plaintiffs' constitutional rights. The seizure clearly contravened the most elemental tenets of First Amendment law. First, defendants targeted Rossignol's newspaper for suppression and retaliation because they disagreed with its viewpoint and intended to prevent its message from being disseminated. This by itself was sufficient to violate the Constitution. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 828, 132 L. Ed. 2d 700,

115 S. Ct. 2510 (1995). And when, as here, the government targets "not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992).

Second, the category of speech that defendants suppressed "occupies the core of the protection afforded by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346, 131 L. Ed. 2d 426, 115 S. Ct. 1511 (1995). "Discussion of public issues" and "debate on the qualifications of candidates" for public office have always been "integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976) (per curiam). And "it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275, 28 L. Ed. 2d 35, 91 S. Ct. 621 (1971) (overturning state libel judgment against newspaper for criticism of a political candidate three days before the primary). The First Amendment therefore "affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas,'" since "in a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *Buckley,* 424 U.S. at 14-15 (citations omitted). It is for that reason that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.*, 401 U.S. at 272. In suppressing criticism of their official conduct and fitness for office on the very day that voters were heading

to the polls, defendants did more than compromise some attenuated or penumbral First Amendment right; they struck at its heart.

Third, the fact that defendants paid for the newspapers in no way affects the conclusion that the seizure violated plaintiffs' right to disseminate core political speech. "Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256, 41 L. Ed. 2d 730, 94 S. Ct. 2831 (1974). The First Amendment is about more than a publisher's right to cover his costs. Indeed, it protects *both* a speaker's right to communicate information and ideas to a broad audience *and* the intended recipients' right to receive that information and those ideas. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. PICO*, 457 U.S. 853, 867, 73 L. Ed. 2d 435, 102 S. Ct. 2799 (1982). Liberty of circulation is as important to freedom of the press "as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Lovell v. City of Griffin*, 303 U.S. 444, 452, 82 L. Ed. 949, 58 S. Ct. 666 (1938) (quoting *Ex parte Jackson*, 96 U.S. 727, 733, 24 L. Ed. 877 (1877)).

It is because of the inherently communicative purpose of First Amendment activity that compensation in the form of lost profits is legally insufficient as a remedy for the loss of First Amendment freedoms. *See Elrod v. Burns*, 427 U.S. 347, 373-74, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) (plurality opinion) (citing *New York Times Co. v. United States*, 403 U.S. 713, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971)). The fact that a small newspaper seeks to turn a meager profit does not remove it from the protections of the

First Amendment. The Supreme Court has made clear that "the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5, 100 L. Ed. 2d 771, 108 S. Ct. 2138. What matters is that defendants intentionally suppressed the dissemination of plaintiffs' political ideas on the basis of their viewpoint. And in doing so before the critical commentary ever reached the eyes of readers, their conduct met the classic definition of a prior restraint. *E.g.*, *Near v. Minnesota*, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625 (1931).

III.

The district court granted summary judgment for defendants on the grounds that "the mass purchase constituted private conduct not executed under color of state law" as required by 42 U.S.C. § 1983. 199 F. Supp. 2d 279, 289 (D. Md. 2002). In so holding, it necessarily denied plaintiffs' motion for partial summary judgment as well. We review these rulings de novo. *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 340-41 (4th Cir. 2000). When faced with cross-motions for summary judgment, the court must review each motion separately on its own merits "to determine whether either of the parties deserves judgment as a matter of law." *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 62 n.4 (1st. Cir 1997) (citation and internal punctuation omitted). When considering each individual motion, the court must take care to "resolve all factual disputes and any competing, rational inferences in the light most favorable" to the party opposing that motion. *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996).

To state a claim for relief under § 1983, plaintiffs must demonstrate that defendants' effort to suppress the distribution of *St. Mary's Today* was perpetrated under color of state law. 42 U.S.C. § 1983 (2002). The color of law requirement excludes from the reach of § 1983 all "merely private conduct, no matter how discriminatory or wrongful." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 143 L. Ed. 2d 130, 119 S. Ct. 977 (1999) (citation and internal punctuation omitted). If the substance of § 1983 is not to be substantially eviscerated, however, "its ambit cannot be a simple line between States and people operating outside formally governmental organizations." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295, 148 L. Ed. 2d 807, 121 S. Ct. 924 (2001).[1] Section 1983 therefore includes within its scope apparently private actions which have a "sufficiently close nexus" with the State to be "fairly treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974). "There is no specific formula for defining state action" under this standard. *Hicks v. Southern Maryland Health Sys. Agency*, 737 F.2d 399, 402 n.3 (4th Cir. 1984)

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[1] *Brentwood* and several other cases cited herein addressed the issue of state action. They control our inquiry nonetheless, since if a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, it also constitutes action "under color of state law" for the purposes of § 1983. *Id.* at 295 n.2 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982)). In the course of its state action inquiries, the Supreme Court has not opted for an objective or subjective test, but simply for a look at the totality of circumstances that might bear on the question of the nexus between the challenged action and the state.

(quoting *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983)). Rather, the question of what is fairly attributable to the State "is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Academy*, 531 U.S. at 295.

A.

We have no doubt that the seizure in this case was perpetrated under color of state law. The requisite nexus between defendants' public office and their actions during the seizure arose initially out of their censorial motivation. Defendants executed a systematic, carefully-organized plan to suppress the distribution of *St. Mary's Today*. And they did so to retaliate against those who questioned their fitness for public office and who challenged many of them in the conduct of their official duties. The defendants' scheme was thus a classic example of the kind of suppression of political criticism which the First Amendment was intended to prohibit. The fact that these law enforcement officers acted after hours and after they had taken off their badges cannot immunize their efforts to shield themselves from adverse comment and to stifle public scrutiny of their performance. *Revene v. Charles Cty. Comm'rs*, 882 F.2d 870, 872 (4th Cir. 1989).

To begin with, it is clear that if a defendant's purportedly private actions are linked to events which arose out of his official status, the nexus between the two can play a role in establishing that he acted under colorof state law. In *Layne v. Sampley*, 627 F.2d 12 (6th Cir. 1980), for example, an off-duty police officer was in plain clothes, had been on vacation for several days, and was sitting in his personal car when he shot the plaintiff. The Sixth Circuit nonetheless held that there

was sufficient evidence to support a finding that the defendant had acted under color of state law, in large part because "the animosity grew out of [the officer's] performance of his official duties." *Id.* at 13. And in *United States v. Causey,* 185 F.3d 407 (5th Cir. 1999), the Fifth Circuit held that a police officer had acted under color of state law when he conspired with two civilians to murder a woman who had filed police brutality charges against him. Important to the decision was the fact that the desire to retaliate against the victim arose out of her criticism of the defendant's actions in his official capacity. *Id.* at 415-16.

Indeed, where the action arises out of purely personal circumstances, courts have not found state action even where a defendant took advantage of his position as a public officer in other ways. For example, in *Martinez v. Colon*, 54 F.3d 980 (1st Cir. 1995), an onduty police officer shot his coworker with a state-issued revolver while they were both in the stationhouse. The court nonetheless held that the defendant had not acted under color of state law because the shooting had arisen from a "singularly personal frolic: tormenting an acquaintance," and because defendant's "status as a police officer simply did not enter into" his decision to torment the victim. *Id.* at 987; *see also Bonsignore v. City of New York*, 683 F.2d 635, 638-39 (2d Cir. 1982) (no state action where police officer shot his wife with a police revolver and then committed suicide).

The actions here arose out of public, not personal, circumstances. Where the sole intention of a public official is to suppress speech critical of his conduct of official duties or fitness for public office, his actions are more fairly attributable to the state. That was the case here. Defendants

were enraged by what they called Rossigl's "unsavory journalism." And they had reason to dislik his coverage: their depositions detail at length Rossignol's past attacks on their performance of official duties. They wer also convinced that *St. Mary's Today* would print election day attacks on "Voorhaar [or] anybody that was not on [Ross gnol's] ticket." So they decided both to punish Rossignol's revious speech by "pissing him off" and to suppress his expe ted election day criticism of Sheriff Voorhaar's performa nce in office. Defendants' statements on the videotape recorded that evening further emphasize their desire to "c anse the filth" printed in the newspaper and prevent the "pa k of lies" from being circulated. Among other comparable comments, one deputy said, "you call us idiots, Rossignol? e'll show you. . . . We'll show you, Rossignol; that's al I got to say." Another deputy stated that "we don't belie e in blasphemy being published, so we're buying them all."

In their scheme to silence disrespectful sp ech, defendants seemed called to resurrect the discredite concept of a criminal libel, which was broadly invoked in seventeenth and eighteenth century England to silence adve se comment on public personages, all in the name of preser ing "the King's peace." As one historian has noted, how ver, the King's peace was "as wide a phrase as the King's En lish. To disturb the King's peace of mind was probably a bre ch of the King's peace. . . . [A criminal libel] might brin institutions or prominent persons into contempt, or hatr l, or ridicule." William H. Wickwar, *The Struggle for the Freedom of the Press* 20 (1928). It goes without saying that t is stigmatization of speech critical of public officials was amo g the chief evils that the First Amendment sought to combat

Ultimately, defendants were driven by a desire to retaliate against Rossignol's past criticism of their fitness for office and to censor future criticism along the same lines. This link between the seizure's purpose and defendants' official roles helps demonstrate that defendants' actions bore a "sufficiently close nexus" with the State to be "fairly treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. at 351.[2]

B.

Several additional factors reinforce our conviction that defendants acted under color of state law.

Among these was defendants' ability to use their positions in the Sheriff's Department to ensure that they would not be prosecuted for their election day seizure. Under Maryland law, the Newspaper Theft Act prohibits "knowingly or willfully obtaining or exerting control that is unauthorized over newspapers with the intent to prevent another from reading the newspapers." Md. Code, Criminal Law § 7-106(b) (2002) (recodified version of law in effect during the seizure). The Act was passed to criminalize such events as the *St. Mary's Today* seizure: mass censorship-oriented appropriations of newspapers which cannot otherwise be punished as theft. *See* Thomas W. Waldron, "Pilfered Papers:

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[2] The principal case defendants cite in opposing this conclusion is not controlling here. *See Hughes v. Halifax Cty. Sch. Bd.*, 855 F.2d 183 (4th Cir. 1988). Its brief and factbound discussion of state action focused on defendants' spur-of-the-moment harassment of a coworker in the workplace rather than a conspiracy to suppress by prior restraint the distribution of election day political speech.

If a Crime, What Punishment?", *Balt. Sun*, Jan. 5, 1994, at 1B (discussing history leading to passage of Act); Editorial, "Can You 'Steal' a Free Paper?", *Wash. Post*, Jan. 22, 1994, at A16 (same). In other words, defendants' efforts to prevent St. Mary's County readers from reading Rossignol's newspaper put them in direct peril of criminal prosecution under Maryland law.

Voorhaar's position as Sheriff, however, gave him the ability to help shield his coworkers from the consequences of their crime through both formal direction of his department's investigations and informal ties to other law enforcement agencies. And his personal contribution of $500 made Voorhaar part of the conspiracy and served as a bond of solidarity with the other deputies involved in the seizure. Resting on the powers of his public office and his own self-interest in avoiding prosecution, Voorhaar's sanction operated as a concrete assurance that the rest of the defendants would be shielded from criminal repercussions by the cloak of state protection. This in turn meant that the St. Mary's County Sheriff Department "did more than adopt a passive position" towards the seizure, *Chestnut Ridge*, 218 F.3d at 342 (quoting *Skinner v. Ry. Labor Executives' Ass'n.*, 489 U.S. 602, 615, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989)), and instead gave "significant encouragement" to its perpetrators. *Mentavlos v. Anderson*, 249 F.3d 301, 311 (4th Cir. 2001) (quoting *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 52).

Additionally, the deputies' identities as state officers played a role at several points during the seizure itself. They were recognized as police officers by store employees throughout the county. They were carrying their state-issued firearms, and some of those firearms were visible during the

evening. And one of them was wearing a Fraternal Order of the Police sweatshirt. It is no surprise, then, that at least one clerk was intimidated into selling his entire run of newspapers by the deputies' authority as state officials. When the deputies first tried to buy all the papers, he said "y'all can't do that because other people want to read them." The clerk later testified, however, that while the deputies made no explicit threats, "they basically came off real intimidating" and "made it real apparent . . . if I didn't sell it to them, then they could make my life here a living hell. . . . It wouldn't be that hard [for them] to set [me] up for something." *Cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68, 9 L. Ed. 2d 584, 83 S. Ct. 631 (1963) (noting that"people do not lightly disregard public officers' thinly veiled threats").

The effect of a police presence on a store owner or clerk is not hard to imagine. Proprietors of small stores often feel a keen need to stay on the right side of local law enforcement. They depend heavily on prompt responses by the police to their calls, as well as on freedom from harassment and other unnecessary difficulties with the police. *See, e.g., Turner v. Dammon*, 848 F.2d 440, 442-43, 445-47 (4th Cir. 1988). The 7-Eleven policy of giving free coffee and soft drinks to sheriff's deputies, for example, is driven by a desire for good relations with the local police. The strength of this interest is amply confirmed by the willingness of the convenience stores in this case to sell their entire run of newspapers to the police at one stroke, even to their potential economic detriment. Running out of newspapers risked offending other customers and cutting off a significant flow of ancillary business: a major reason to sell newspapers is to attract customers into the store in the first place, thereby leading them to buy other items that they otherwise might not have purchased there.

In sum, the nexus between defendants' actions and the state arose from more than just defendants' desire to still criticism of their public performance. Their status as sheriff's deputies enabled them to execute their scheme in a manner that private citizens never could have.

C.

Finally, both the First Amendment and 42 U.S.C. § 1983 exist in significant part to deter the kind of misdeeds perpetrated by defendants on election day. The First Amendment was drafted in the context of a lengthy history of censorship carried out by private organizations with complicated ties to the state apparatus and compelling motives to suppress speech unfavorable to the Crown. The Stationers' Company was a private guild of printers with its origins in medieval England; it was granted valuable monopolies and privileges by the government. Fredrick Seaton Siebert, *Freedom of the Press in England, 1476-1776*, at 64-66, 135 (1952). In exchange for the assurance of this valued status, the Stationer's Company acted as a vigorous censor, searching printing houses both for material which violated the Company's own monopolistic privileges and for material considered dangerous to the Crown. *Id.*; *see also* Cyprian Blagden, *The Stationers' Company: A History, 1403-1959*, at 20-21, 32-33 (1960). The drafters of the First Amendment knew full well that censorship is equally virulent whether carried out by official representatives of the state or by private individuals acting out of a self-interested hope in receiving or maintaining benefits from the state. Historical experience flatly belies defendants' argument that the First Amendment cannot apply to their censorial seizure because they were not wearing state uniforms.

Similarly, defendants' conspiracy bears many of the hallmarks of the civil rights violations that prompted the passage of § 1983. That statute was enacted principally to deal with conspiracies between local law enforcement officers and private individuals -- typically via the Ku Klux Klan -- to violate the rights of former slaves. The supporters of 42 U.S.C. § 1983 saw a criminal justice system "under the control of those who are wholly inimical to the impartial administration of law and equity," and asked "what benefit would result from appeal to . . . officers [who] are secretly in sympathy with the very evil against which we are striving?" Cong. Globe, 42d Cong., 1st Sess. 394 (1871) (statement of Rep. Rainey). *see also Monroe v. Pape*, 365 U.S. 167, 171-87, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961). Congress had no doubt about the complicity of those who in their official capacities promoted the subterfuge of private arrangements to accomplish constitutionally impermissible ends. Indeed, "without concert, understanding, and arrangement," it "could not be possible that all should be acquitted who were arrested. It could not happen that in some localities a vast number of these crimes were committed and no one arrested. . . . These things do not occur thus accidentally." Cong. Globe, 42d Cong., 1st Sess. 459 (1871) (statement of Rep. Coburn). The whole purpose of the Ku Klux Klan Act was to prevent public authorities from violating constitutional rights through the use of nominally private means. Whether the rights be those of small papers and their readers or those of freedmen is not dispositive. The unlawfulness of private infringement of those rights under color of state law remains the same.

We would thus lose sight of the entire purpose of § 1983 if we held that defendants were not acting under color of state law. Here, a local sheriff, joined by a candidate for State's

Attorney, actively encouraged and sanctioned the organized censorship of his political opponents by his subordinates, contributed money to support that censorship, and placed the blanket of his protection over the perpetrators. Sheriffs who removed their uniforms and acted as members of the Klan were not immune from § 1983; the conduct here, while different, also cannot be absolved by the simple expedient of removing the badge.[3]

IV.

The incident in this case may have taken place in America, but it belongs to a society much different and more oppressive than our own. If we were to sanction this conduct, we would point the way for other state officials to stifle public

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[3] Plaintiffs' motion for summary judgment on the "color of law" issue is inextricably intertwined with defendants' summary judgment motion on that same question, because they each rest on identical factual and legal issues. The First Amendment inquiry is likewise inextricably intertwined with defendants' summary judgment motion, since the same retaliatory suppression of core political speech lies at the heart of each. *See Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 50-51, 131 L. Ed. 2d 60, 115 S. Ct. 1203 (1995) (appellate courts may review issues that are "inextricably intertwined" with another issue properly on appeal). However, the questions of qualified immunity, municipal liability, the extent to which defendant's conduct is actionable under the Maryland Constitution and Maryland common law, and the extent to which defendant Alioto participated in the seizure have not been fully briefed by the parties and have not been shown to be inextricably intertwined with the issue properly before the court as required by *Swint*. These issues must be addressed by the district court on remand.

criticism of their policies and their performance. And we would leave particularly vulnerable this kind of paper in this kind of community. Alternative weeklies such as *St. Mary's Today* may stir deep ire in the objects of their irreverence, but we can hardly say on that account that they play no useful part in the political dialogue. No doubt the public has formed over time its opinion of the paper's responsibility and reputation. If defendants believed its attacks to be scurrilous, their remedy was either to undertake their own response or to initiate a defamation action. It was not for law enforcement to summon the organized force of the sheriff's office to the cause of censorship and dispatch deputies on the errands of suppression in the dead of night.

The judgment of the district court is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action WMN-99-3302

[Decided February 21, 2002]

KENNETH C. ROSSIGNOL, et al.)
)
v.)
)
RICHARD VOORHAAR, et al.)
)

JUDGES:
William M. Nickerson, United States District Judge.

MEMORANDUM

Before the Court are: Plaintiffs' Motion for Summary Judgment on Liability Issues (Paper No. 69); Cross-Motion for Summary Judgment filed by Defendants Doolan, Long, Merican, Myers, Willenborg, and Young (Paper No. 73); Defendant Fritz's Cross-Motion for Summary Judgment (Paper No. 74); Cross-Motion for Summary Judgment filed by Defendants Voorhaar, Alioto, and Board of County Commissioners for St. Mary's County ("the County") (Paper

No. 75).[1] The motions have been exhaustively briefed and are ripe for decision. Upon review of the pleadings and applicable case law, the Court determines that no hearing is necessary (Local Rule 105.6) and that all Defendants will be granted summary judgment as to Counts 1-3, which assert causes of action under 42 U.S.C. § 1983, and the remaining state law claims (Counts 4-6) will be dismissed for lack of jurisdiction.

I. FACTUAL BACKGROUND

The facts of this unusual case are, for the most part, undisputed. Plaintiff is the publisher of a weekly community newspaper called St. Mary's Today. Defendants include St. Mary's County Sheriff Richard Voorhaar, seven members of the Sheriff's Department,[2] St. Mary's County State's Attorney Richard Fritz, and the county Board of Commissioners. Late on the night of November 2, 1998, and in the early morning hours of November 3, a large number of St. Mary's Today newspapers were purchased en masse by several of the Sheriff's Department Defendants, among other people, just

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[1] Defendants Doolan, Long, Merican, Myers, Willenborg, and Young also filed a motion for leave to file their reply memorandum in excess of the page limit (Paper No. 78). The motion will be granted.

[2] The Sheriff's Department Defendants, and their ranks as of November 2, 1998, are as follows: Steven Doolan (Captain); Edward Willenborg (Corporal, Narcotics Section); Michael Merican (Sergeant, Internal Affairs Division); Lyle Long (Sergeant, Criminal Investigations Unit); Steven Myers (Deputy First Class); Harold Young (Deputy First Class); and Daniel Alioto (Deputy First Class).

hours before the local election, in which Defendants Voorhaar and Fritz were candidates. Before describing the events of that night, however, the Court will provide some background information about the parties.

In 1990, Plaintiff Kenneth Rossignol began publishing St. Mary's Today, a weekly community newspaper serving St. Mary's County and two adjoining counties.[3] In the autumn of 1998, Plaintiff printed[4] approximately 6,500 copies per issue, most of which were sold in St. Mary's County. According to Plaintiff, about 2,600 newspapers were sold in retail stores in St. Mary's County, and about 1,100 were sold from newsboxes. The remaining newspapers were sold either to subscribers or at locations outside of St. Mary's County. Each issue of St. Mary's Today sold for 75 cents.

There is no question that articles appearing in St. Mary's Today have tended to generate a great deal of controversy. The paper often took a sharply critical stance toward public officials, including members of the St. Mary's County

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[3] Rossignol publishes the paper through the Island Publishing Company, which is also named as a plaintiff in this action. Rossignol notes that he brought suit on behalf of the company in order to avoid argument that the proper party had not instituted the action. Defendants assert that Island Publishing is not a proper party. The disposition of this case in favor of Defendants, however, effectively moots the issue. In light of this, for the purposes of this memorandum, the Court will ignore the presence of Island Publishing Company as a plaintiff.

[4] Plaintiff contracted with the Washington Times to print the newspapers.

Sheriff's Department and the State's Attorney. According to Plaintiff, the paper's brand of journalism is "hard-hitting" and not-infrequently controversial." Pl.'s Brief at 4. Defendants, however, refer to the paper as "unsavory," "scathing," and "outright lies." See, e.g., Merican Response to Interrogatory 1; Willenborg Dep. at 37-39; Fritz Dep. at 33.

Defendants have described in particular how they were portrayed by the newspaper. According to Defendant Fritz, the paper had referred to Defendant Doolan as a "drunk," and Defendant Long as a "child abuser" and a "lazy" officer. See, Fritz Dep. at 126-28. Defendant Willenborg claims that St. Mary's Today prints lies about his family, see Willenborg Dep at 37-39, 222; Defendant Merican recalled being referred to as a "shoeshine boy," as well as other insults. See, Merican Dep. at 27-30. Defendant Voorhaar reports that the paper has "written a lot of things about me for a long period of time," and that eventually he stopped reading St. Mary's Today. See, Voorhaar Dep. at 21. Plaintiff does not dispute this testimony, although he points out that at times St. Mary's Today has printed favorable coverage of the Sheriff's office. See Pl.'s Brief at 7.

Tuesday, November 3, 1998 was election day in St. Mary's County. Running for office that day were, among others, Sheriff Voorhaar, who was running for re-election as Sheriff, and Richard Fritz, who was running for State's Attorney for St. Mary's County. It was also the day that St. Mary's Today was scheduled to come out with its weekly issue. About a week before election day, some of the Sheriff's Department Defendants began to construct a plan to buy up a large number of St. Mary's Today papers on the night before the election, when the papers were scheduled to be delivered

to stores and newsboxes. Defendant Willenborg was the first to come up with the idea. Shortly thereafter, Defendants Long, Merican, and Doolan agreed to participate in the plan. Defendant Willenborg has also testified that there was "passing conversation" about the plan with people at work, as people were "passing in the hallway." Willenborg Dep. at 211. Sheriff Voorhaar, who did not participate in the mass purchase, has stated that he knew about the plan about a week before election day, and had communicated his support for the idea.[5] See, Voorhaar Dep. at 112.

There is little dispute about the planning of the mass purchase. Defendant Willenborg mentioned the idea to two civilians after a Fritz campaign meeting at Fritz's house. The civilians agreed to participate in the purchase, and suggested that they meet at the home of one of the civilians on the Sunday prior to the election, to plan which stores each would visit to make the purchases. Present at that meeting were Defendants Willenborg, Doolan, Merican, and Alioto, who were all off-duty, along with several civilians. Participants agreed that the members of the Sheriff's Department should "not wear anything that resembled the police," see Doolan Dep. at 65, and that they should drive private vehicles. Furthermore, they agreed to obtain receipts for the store-bought papers, and to videotape the newsbox purchases to document the fact that they had paid for each paper. See, e.g., Merican Dep. at 43. Defendants also testify that they

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[5] Sheriff Voorhaar did independently purchase some copies of St. Mary's Today on the night before the election, but the number is disputed. See, Voorhaar Dep. at 58 (stating he bought four copies); Doolan Dep. at 192 (stating that Voorhaar had told him he bought 15 to 20 copies).

agreed that if any store clerks refused to sell the papers, they would simply leave and not buy them. See, Merican Dep. at 42; Doolan Dep. at 115. Also at the meeting, Defendant Willenborg handed out a list of the locations of newsboxes and stores selling St. Mary's Today, which had been compiled by Defendant Long when he "drove around St. Mary's County one night checking places that sold St. Mary's Today." See, Willenborg Dep. at 199-200.

To fund the mass purchase, Defendants collected money from various sources. Sheriff Voorhaar contributed $500. Voorhaar Dep. at 41. Defendant Doolan gave $75. Doolan Dep. at 89. Defendant Fritz contributed $500, although he testified that he was merely passing along a contribution from his brother. Fritz Dep. at 47. One local resident contributed $2,500; others contributed smaller amounts. See, Willenborg Dep. at 146-48. Plaintiff has neither argued nor submitted evidence that the contributions came from any campaign or public funds.

At approximately 11:00 p.m. on November 2, 1998, Defendants Doolan, Merican, Young, Long, Myers, Willenborg, and Fritz met at Defendant Long's home. All six Sheriff's deputies were off-duty throughout the night.[6] Stickers depicting a copy of St. Mary's Today going into a trash can were handed out, and some of the defendants wore them throughout the night.[7] See, e.g. Willenborg Dep. at 71.

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[6] One Defendant in this case, Deputy Alioto, was on duty that night, but did not accompany other Defendants on their purchases.

[7] The stickers were designed and produced by a civilian who is not a party to this lawsuit.

At this meeting, some Defendants expressed concerns about the legality of their plan and asked Defendant Fritz for his opinion. Defendant Fritz suggested that they obtain receipts for their purchases, but otherwise advised the others that he believed Defendants had a right to purchase as many papers as they desired. See, Doolan Dep. at 270; Fritz Dep. at 17. After Defendant Fritz was dropped off at home, the other Defendants divided into two groups to carry out the purchases (Merican, Doolan, and Young; and Willenborg, Long, and Myers).

As planned, Defendants collected receipts from stores and videotaped themselves buying papers from newsboxes. At about 2:00 a.m., as Plaintiff was attempting to repair a jammed newsbox, he noticed that many of his newsboxes were empty. Plaintiff then began to drive around trying to replenish the supply of St. Mary's Today in various locations. Defendants saw Plaintiff's vehicle and began following him, purchasing many of the papers that Plaintiff had attempted to restock. See, Willenborg Dep. at 58. The purchases continued throughout the night, until about 7:00 a.m. on the morning of November 3, 1998.[8]

Plaintiff alleges that Defendants bought 1,379 newspapers during the night. See, Def. Doolan, et al. Reply at Exh. 19 (Plaintiff's listing of papers "seized"). Defendants do not dispute this calculation. Plaintiff also claims, however, that approximately 300 papers were taken without payment from various stores that were not yet open for business when

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[8] Later that day, both Defendant Voorhaar and Defendant Fritz won election to their respective offices.

Defendants arrived. See, Pl.'s Brief at Exh. 11, 14 (Pl.'s responses to interrogatories). Defendants deny that any papers were taken without payment. It is undisputed, however, that the papers in Defendants' possession on the morning of November 3, 1998, were bundled and placed in a barn on property owned, at least in part, by Defendant Fritz's family.

On the videotape of the newsboxes purchases, as well as in testimony prepared for this lawsuit, Defendants have expressed their purposes for executing the mass purchase of St. Mary's Today. Many Defendants state that they participated in the mass purchase because they had expected that the election day edition of St. Mary's Today would print something highly critical of Defendant Fritz, who was running for the office of State's Attorney and whom many Defendants supported. See, e.g., Doolan Dep. at 50 ("It is my opinion that . . . [Plaintiff was] out to slander Mr. Fritz to keep him from becoming the State's Attorney"); Voorhaar Response to Interrogatory, Pl.'s Brief at Exh. 19 (stating that he expected Plaintiff to "smear" Fritz, "thereby depriving him of an opportunity to defend himself prior to the election).[9] At least one Defendant also suspected the paper would publish a negative story about Sheriff Voorhaar, who was running for re-election. See, Willenborg Dep. at 219. Several Defendants also described the mass purchase as a

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[9] Not long before the 1998 election, Plaintiff began operating an "on line" version of St. Mary's Today, which apparently previewed the forthcoming print edition. Defendants deny that they saw the website prior to the election, but instead based their predictions of the paper's content on their "experience with previous St. Mary's Today election editions." See, e.g., Doolan Dep. at 50-51.

"protest," or as an attempt to anger or "one up" Plaintiff. See, e.g., Doolan Response to Interrogatories (Def.'s Exh. 10); Merican Dep. at 32, 99; Long Response to Interrogatories (Pl.'s Exh. 16).

Defendants' predictions that the election day edition of St. Mary's Today would run negative stories about Fritz and Voorhaar were realized. In large font, the front-page headline declared, "Fritz Guilty of Rape." The article reported that in 1965, Defendant Fritz had pleaded guilty to carnal knowledge of a minor-a conviction which Fritz does not deny.[10] Another St. Mary's Today election day article, entitled "Woman Supervisor Ordered Him to Have Sex, Says Cop," criticized Sheriff Voorhaar's handling of an alleged sexual harassment complaint.

In 1999, Plaintiff filed a six count Complaint in this Court. Counts 1-3 are brought pursuant to 42 U.S.C. § 1983 and assert violations of Plaintiff's First Amendment rights (Count 1), Fourth Amendment rights (Count 2), and Fourteenth Amendment right to due process (Count 3). Count 4 alleges violations of corresponding rights guaranteed by the Maryland Declaration of Rights (Count 4). The Complaint also alleges the common law violations of tortious interference with business relations (Count 5) and civil conspiracy (Count 6). Plaintiff has moved for summary judgment as to liability on all counts. Defendants have also moved for summary judgment as to all counts.

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[10] The conviction had already been made public by another newspaper four years earlier, when Fritz had also run (unsuccessfully) for State's Attorney.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A party seeking summary judgment bears the initial responsibility of informing the court of the basis of its motion and identifying the portions of the opposing party's case which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The non-moving party is entitled to have "all reasonable inferences . . . drawn in its respective favor." *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1129 (4th Cir. 1987).

If the movant demonstrates that there is no genuine issue of material fact and that the movant is entitled to summary judgment as a matter of law, the non-moving party must, in order to withstand the motion for summary judgment, produce sufficient evidence in the form of depositions, affidavits or other documentation which demonstrates that a triable issue of fact exists for trial. *Celotex,* 477 U.S. at 324. Unsupported speculation is insufficient to defeat a motion for summary judgment. *Felty*, 818 F.2d at 1128 (citing *Ash v. United Parcel Serv., Inc.*, 800 F.2d 409, 411-12 (4th Cir. 1986)).

When both parties file motions for summary judgment, the court applies the same standards of review. *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir.1991); *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 45 n. 3

(4th Cir. 1983) ("The court is not permitted to resolve genuine issues of material facts on a motion for summary judgment--even where ... both parties have filed cross motions for summary judgment")(emphasis omitted), cert. denied, 469 U.S. 1215, 84 L. Ed. 2d 337, 105 S. Ct. 1191 (1985). The role of the court is to "rule on each party's motion on an individual and separate basis, determining, in each case, whether a judgment may be entered in accordance with the Rule 56 standard." *Towne Mgmt. Corp. v. Hartford Acc. and Indem. Co.*, 627 F. Supp. 170, 172 (D. Md. 1985)(quoting Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2720 (2d ed. 1993)). See also *Federal Sav. and Loan Ins. Corp. v. Heidrick*, 774 F. Supp. 352, 356 (D. Md. 1991). "Cross-motions for summary judgment do not automatically empower the court to dispense with the determination whether questions of material fact exist." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 349 (7th Cir. 1983), cert. denied, 464 U.S. 805, 78 L. Ed. 2d 72, 104 S. Ct. 53 (1983). "Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). Both motions may be denied. See *Shook v. United States*, 713 F.2d 662, 665 (11th Cir. 1983).

III. DISCUSSION

To prevail in an action under 42 U.S.C. § 1983, a plaintiff must demonstrate that defendants acted "under color of state law" to deprive the plaintiff of a right secured by the Constitution or laws of the United States. See, *West v. Atkins*, 487 U.S. 42, 48, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988).

An individual acts under color of state law when exercising or misusing power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326, 85 L. Ed. 1368, 61 S. Ct. 1031 (1941). A state employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law. See, *Parratt v. Taylor*, 451 U.S. 527, 535-36, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981). See also *Monroe v. Pape*, 365 U.S. 167, 172, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961), overruled on other grounds by *Monell v. Dept. of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).

In contrast, the "acts of police officers in the ambit of their personal, private pursuits fall outside of 42 U.S.C. § 1983." *Revene v. Charles County Commissioners*, 882 F.2d 870, 872 (4th Cir. 1989) (citations omitted). A state officer's private conduct, no matter how wrongful, is not actionable under § 1983. See, *Barna v. Perth Amboy*, 42 F.3d 809, 816 (3rd Cir. 1994) (stating that "a police officer's purely private acts which are not furthered by any actual or purported state authority are not acts under color of state law.").

When determining whether a defendant acted under color of state law, "the nature of the act performed is controlling." *Revene*, 882 F.2d at 872 (citing Monroe v. Pape at 184-87). Whether or not the defendant officers were on duty, wearing a uniform, driving a patrol car, or exhibiting other indicia of state authority, may inform the inquiry but is not dispositive of the issue. See, *Robinson v. Davis*, 447 F.2d 753, 759 (4th Cir. 1971). Rather, the reviewing court must examine the

nature and circumstances of the defendant's conduct to determine whether it is "fairly attributable to the state." Revene at 872 (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982)).

In support of his motion for summary judgment, Plaintiff first argues that the Defendants who actually purchased the newspapers (hereinafter, "the Purchasing Defendants") acted under color of state law because of the close "nexus" between the speech they sought to suppress and their conduct as public officials. In other words, Plaintiff contends that the Purchasing Defendants' conduct was directly related to their performance of official duties, because it was allegedly carried out in retaliation for Plaintiff's outspoken criticism of that performance.

Plaintiff's argument misses the mark for two reasons. First, it does not apply to those Purchasing Defendants whose expressed purpose was not to retaliate for Plaintiff's critique of their job performance, but rather to minimize negative press about Candidate Fritz on the day of the election. More importantly, Plaintiff's argument misapplies the law as it relates to § 1983's "under color of state law" requirement. In emphasizing the "nexus" between Defendants' conduct and their positions as state officials, Plaintiff relies upon cases in which the defendants were private citizens, not state officials, and the inquiry was whether their actions could be treated as those of the State itself. See, e.g., *Mentavlos v. Anderson*, 249 F.3d 301, 310 (4th Cir. 2001), cert. denied, 151 L. Ed. 2d 264, 122 S. Ct. 349 (2001); *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 148 L. Ed. 2d 807, 121 S. Ct. 924 (2001). Here, however, the Purchasing Defendants are unquestionably state officials,

and the inquiry is whether "the actions complained of were committed while the defendants were purporting to act under the authority vested in them by the state, or were otherwise made possible because of the privileges of their employment." *Hughes v. Halifax County School Board*, 855 F.2d 183, 186-87 (4th Cir. 1988); see also *United States v. Classic*, 313 U.S. 299, 326, 85 L. Ed. 1368, 61 S. Ct. 1031 (1941) (enunciating traditional "under color of state law" standard).

The fact that Defendants' conduct was related to or motivated by their state employment does not transform that conduct into state action under the standards set forth above. Cases cited by Plaintiff to support the proposition that it does are distinguishable, because in each of those cases the defendant was found to have acted under color of state law, independently of his or her motive for acting.[11] See, e.g., *United States v. Causey*, 183 F.3d 407, 415-16 (5th Cir. 1999), cert. denied, 530 U.S. 1277, 147 L. Ed. 2d 1010, 120 S. Ct. 2747 (2000) (where defendant police officer participated in the murder of a woman who had filed a complaint against him, defendant's "status as a police officer put him in the unique position to 'handle the thirty' [police code for murder] and thus offer protection to [the murderer] from the consequences of the murder"); *Dang Vang v. Vang*

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[11] In making his argument, Plaintiff relies heavily on *Coming Up v. San Francisco*, 857 F. Supp. 711 (N.D. Cal. 1994), which held that, where the police chief ordered officers to confiscate copies of free newspaper that criticized his conduct, and officers did so while on duty and driving a police vehicle, the police chief and officers were precluded from obtaining qualified immunity at summary judgment. The case is distinguishable on its facts and does not provide authoritative guidance for this Court.

Xiong X. Toyed, 944 F.2d 476 (9th Cir. 1991) (finding that jury reasonably could have concluded that defendant used his government position to exert influence and physical control over plaintiffs in order to sexually assault them); *ACLU v. Wicomico County*, 999 F.2d 780 (4th Cir. 1993) (prison officials acted under color of state law in barring plaintiff from visiting inmates to document their complaints).[12]

Perhaps recognizing the weakness of his first argument, Plaintiff later submitted to the Court additional factual evidence that allegedly demonstrates that the Purchasing Defendants used their official authority to carry out their plan.[13] Viewed in the light most favorable to Plaintiff, these additional facts include the following: (1) at least two of the Purchasing Defendants carried their service weapons during the night; (2) Defendant Merican wore a Fraternal Order of Police sweatshirt, which a store clerk recognized as bearing a police symbol; (3) Defendants Willenborg and Long used

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[12] Plaintiff also falters when he relies on the seminal case *New York Times v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) to support his position. That decision, which held that a public official may not recover damages for defamatory statements without showing actual malice, in no way stands for the proposition, as Plaintiff would have it, that "a government official's suppression of [speech that is critical of his conduct] necessarily bears a sufficiently close nexus to his role as a public official and performance of his duties to warrant the imposition of liability under Section 1983." Pl.'s Brief at 37-38.

[13] Plaintiff explains that he does not rely on these additional facts in support of his own motion for summary judgment, but rather contends that they preclude the entry of summary judgment for Defendants.

Sheriff's office pagers; (4) many of the store clerks recognized Defendants as law enforcement officers from previous contacts; (5) one store clerk was intimidated by Defendants into selling them his supply of the papers; (6) one customer was prevented from buying a copy of St. Mary's Today and recognized Defendants as police officers. See, Pl.'s Separate Statement of Additional Facts, Paper No. 76, and attachments thereto.

The officers' firearms, if visible, certainly convey state authority. So does a police symbol on an item of clothing. Plaintiff, however, provides no evidence that these indicia of authority had the effect of intimidating or coercing store clerks into selling newspapers they otherwise would not sell.[14] Cf. *Robinson v. Davis*, 447 F.2d at 759 (observing that outward indicia of authority-or lack thereof-are not dispositive in the "under color of state law" inquiry). The customer deposed by Plaintiff testified that he was not allowed to purchase the newspaper because Defendant Merican leaned on the stack of papers he (Defendant Merican) was purchasing and said, "they're already sold." Hester Dep. at 10. Although the customer was able to deduce that Defendant Merican was a police officer, there is no evidence that Defendant Merican used his authority as such to prevent the customer from making his purchase.

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[14] Plaintiff also fails to provide evidence that the office pagers enabled Defendants to carry out their purchases. Even if they communicated with them during the night, Defendants had already planned their endeavor using the lists of newspaper locations, and had divided into groups to complete the purchases.

The one clerk who testified to being intimidated by Defendants, Justin Van Patten, admitted that his fears stemmed from his history of run-ins with law enforcement (though not with the Defendants who bought the papers from him) and his criminal record. See, Van Patten Dep. at 13, 45-46. Van Patten recognized Defendants as Sheriff's deputies when they entered the store, in part because he had "seen them around in the uniforms" and because he recognized the Maryland police symbol on the sweatshirt of one Defendant. See, Van Patten Dep. at 18. Nowhere in his testimony, however, does Van Patten indicate that Defendants displayed their weapons, identified themselves as Sheriff's deputies, invoked their authority as such, or used their law enforcement powers to obtain the newspapers. The Court concludes that the subjective feelings of this one witness, without evidence that Defendants purported to exercise their police authority over him, are not sufficient to preclude summary judgment for the Purchasing Defendants.[15]

Having concluded that Defendants Willenborg, Doolan, Long, Young, Myers, and Merican are entitled to summary judgment on the § 1983 claims, the Court now turns to the ramifications of this conclusion for other Defendants. First, Plaintiffs claim that Defendant Fritz, who was a private citizen at the time of the mass purchase of St. Mary's Today,

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[15] Plaintiff also asserts that store clerk Beverly Burnett was pressured or coerced into selling all her copies of St. Mary's Today. See, Pl.'s Supp. Facts at 4. Ms. Burnett's deposition, however, reflects that she did not identify the customer as a law enforcement officer, nor did she feel intimidated into selling the papers, nor did the customer become angry or rude with her. Burnett Dep. at 27-29.

should be liable as a joint actor or co-conspirator with the Purchasing Defendants. See, *Street v. Surdyka*, 492 F.2d 368, 374 (4th Cir. 1974) (observing that "even private citizens can take on the color of state law when they participate in police action"). Since this Court has found that the mass purchase constituted private conduct not executed under color of state law, there was no "police action" with which Defendant Fritz could have participated. Therefore, he too is entitled to summary judgment on the § 1983 claims.

Under the same reasoning, Defendant Voorhaar cannot be held liable as a joint actor, co-conspirator, or supervisor of the Purchasing Defendants. Nor can he be found independently liable under § 1983. The evidence of Sheriff Voorhaar's involvement-namely, that he contributed money, communicated his approval of the plan, and personally bought several newspapers on the morning of the election-does nothing to demonstrate that he acted under color of state law. There is no evidence that Sheriff Voorhaar directed or ordered Defendants to carry out the mass purchase, nor that he had reason to believe it constituted state action. Rather, the Sheriff contributed to and supported the private pursuits of his deputies.[16]

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[16] For the same reasons, the Sheriff was not acting as a policy maker when he approved of and contributed to the mass purchase. Therefore, Plaintiff's claim of § 1983 municipal liability against St. Mary's County must fail, as it relied on allegations that Defendant Voorhaar, as the "final policy maker" for the Sheriff's office, "not only ratified the unconstitutional seizure of the [papers], but he actively conspired and acted with the other defendants to carry it out." Pl.'s Brief at 40. Since there was no unconstitutional conduct, the Board of Commissioners for St. Mary's County will be granted

Defendant Alioto is also entitled to summary judgment. Defendant Alioto was on patrol duty the night of November 2, 1998, but did not accompany the Purchasing Defendants as they bought the papers. Defendant Alioto met with Defendant Long in a parking lot at one point during the night to discuss an ongoing automobile theft investigation. See, Willenborg Dep. at 82, 86; Alioto Dep. at 37-41. Plaintiff has offered his speculation that, during the night in question, he heard Defendant Alioto make numerous radio calls, allegedly assisting the Purchasing Defendants with logistics. See, Rossignol Dep. at 102. Defendant Alioto has countered with his testimony that his radio calls were that of a "normal" evening on patrol, see Alioto Dep. at 32-36, and with the testimony of other Defendants, stating that they did not have access to Sheriff's radio transmissions from the private vehicles they used to make the purchases. See, Willenborg Dep. at 189. Based on these facts, Plaintiff simply has not offered sufficient evidence to preclude entry of summary judgment in favor of Defendant Alioto.

Finally, having disposed of all of Plaintiff's federal claims, the Court finds that it has no independent basis for jurisdiction over Plaintiff's pendent state claims. Therefore, Counts 4-6 of the Complaint will be dismissed for lack of subject matter jurisdiction. See, 28 U.S.C. § 1367. In so doing, the Court does not intend to suggest that Plaintiff's state law claims cannot withstand a similar motion if brought in a state proceeding.

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summary judgment as to the claims against it. Having so decided, the Court need not reach the issue of whether, as Plaintiff argues, Defendants acted pursuant to a longstanding custom, practice, or policy of violating Plaintiff's First Amendment rights.

IV. CONCLUSION

For the foregoing reasons, the Court will grant summary judgment to all Defendants as to Counts 1-3 of the Complaint. Counts 4-6 will be dismissed without prejudice. A separate order consistent with this memorandum will issue.

William M. Nickerson

United States District Judge

Dated: February 21st, 2002

ORDER

Pursuant to the foregoing memorandum, and for the reasons stated therein, IT IS this 21st day of February, 2002, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Defendants Doolan, Long, Merican, Myers, Willenborg, and Young's Motion For Leave to File Reply Memorandum in Excess of Page Limit (Paper No. 78) is hereby GRANTED;

2. That Plaintiff's Motion for Summary Judgment on Liability Issues (Paper No. 69) is hereby **[**30]** DENIED;

3. That Defendants Doolan, Long, Merican, Myers, Willenborg, and Young's Motion for Summary Judgment (Paper No. 73) is hereby GRANTED as to Counts 1-3;

4. That Defendant Fritz's Motion for Summary Judgment (Paper No. 74) is hereby GRANTED as to Counts 1-3;

5. That Defendants Voorhaar, Alioto, and Board of County Commissioners for St. Mary's County's Moton for Summary Judgment (Paper No. 75) is hereby GRANTED as to Counts 1-3;

6. That Counts 4-6 of the Complaint are hereby DISMISSED without prejudice;

7. That this case is hereby CLOSED;

8. That any and all prior rulings made by this Court disposing of any claims against any parties are incorporated by reference herein and this order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. P. 58; and

9. That the Clerk of the Court shall mail or transmit copies of the foregoing memorandum and this order to all counsel of record.

William M. Nickerson

United States District Judge